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REASON

Free Minds and Free Markets

March 2001

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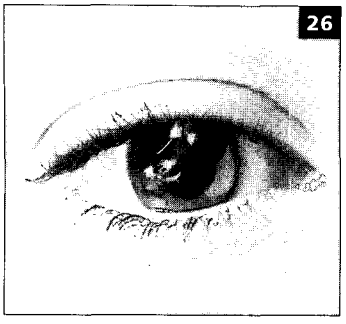

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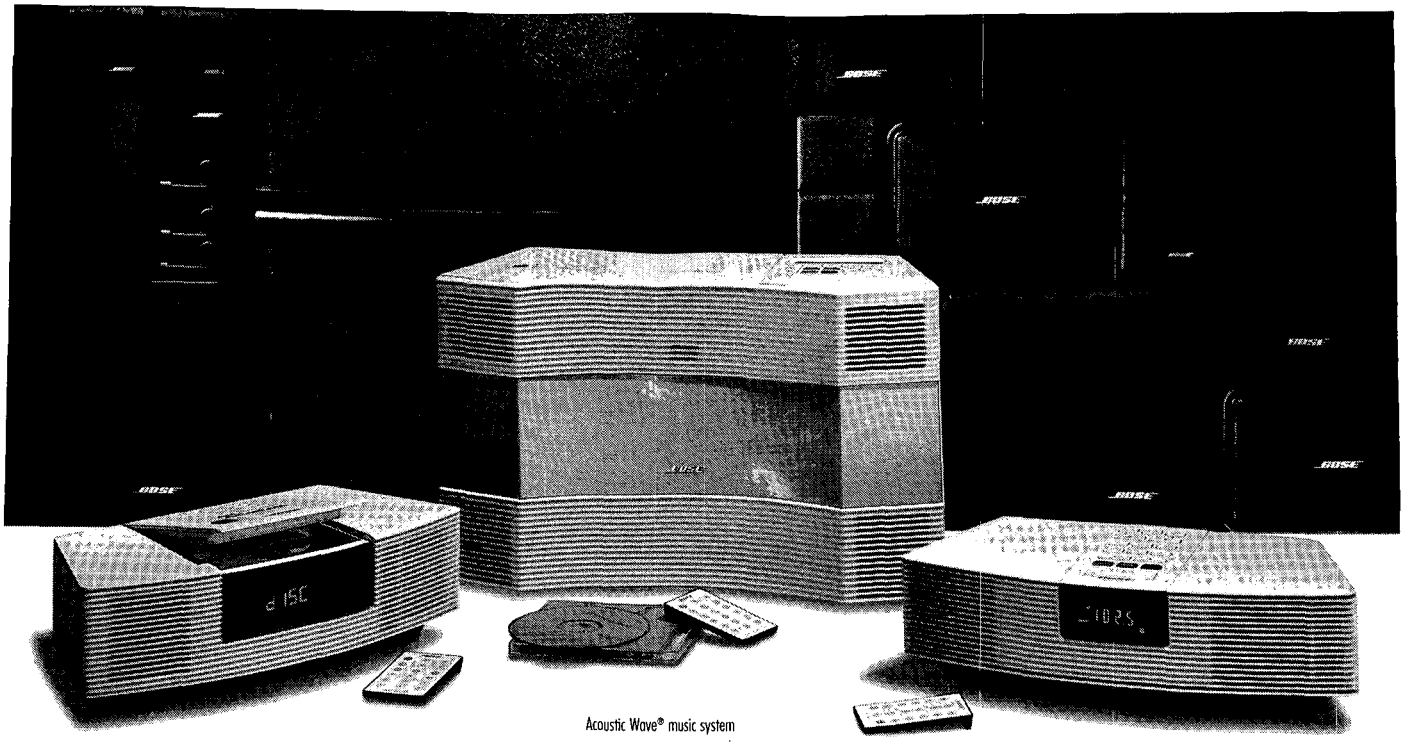

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The 13th Step

Even some drug war opponents buy into its lies.

By Nick Gillespie

Why is it that ostensibly pro-drug movies can never quite deliver the goods, can never quite depict drug use as something other than depraved? When *Trainspotting* hit American theaters in 1996, the controversial tale of Scottish heroin junkies was preceded by a storm of controversy about its allegedly positive, consequences-free portrayal of drug use; the evening yak shows and op-ed pages nattered on about its "irresponsible" content and worried about its likely effect on the youth of America. The promise of a drug movie that didn't follow a shopworn moralistic script was precisely the reason I wanted to see the film. *Trainspotting*, alas, disappointed, though not because it wasn't a thoroughly entertaining, compelling, and at times disturbing drama.

It was all that, to be sure, but it also participated in a long tradition of conflating drug use with addiction and highlighting the seamier sides of drug culture: In one scene, a character sifts through a filthy toilet in a desperate search for a suppository that will get him off; in another, a baby dies due to its junkie parents' neglect.

While the film was thankfully in no way a "hey kids don't do this at home" morality tale, it certainly didn't reflect most people's generally positive experiences with illegal drugs, nor did it make the case for legalization easier. If anything, by dwelling on the dark side of drug use and showing its potential for violence, criminality, and destructiveness, it reinforced the drug warrior mindset.

So it is with *Traffic*, the new Steven Soderbergh film that's been called "a blistering look at our nation's hypocritical and useless war on drugs" (to quote a typical rave review). Though the movie mounts an extensive and generally effective critique of the drug war in its current, hyper-militarized version, it also recycles a number of hysterical myths about drug use that could have come straight out of an old *Dragnet* episode.

Released in late December in New York and Los Angeles and nationwide in early January, *Traffic* has garnered a tremendous critical response, winning recognition from the American Film Institute as one of 2000's outstanding films and a best picture nod from the New York Film Critics Circle. The movie has also done well at the box office, making over $21 million in its first full week of wide release. "Exemplary Hollywood social realism," J. Hoberman approvingly notes in the *Village Voice*. He's right. Though stylishly photographed and well-acted, the film is, to a large extent, an old-fashioned "message" movie.

Though movies such as *Traffic* fail to acknowledge or represent it, there is such a thing as responsible drug use, and it is the rule, not the exception.

Which is to say it is riddled with clichés that ultimately undercut its effectiveness at delivering the news that, as all the main characters say at some point, the War on Drugs is a colossal waste of money, time, and lives that will never succeed in its goal of eradicating drug use. But even as *Traffic* seeks to chastise those who conceive and prosecute our nation's misguided anti-drug policies—more medical treatment, less police could be the movie's mantra—it paints illegal drugs as soul-sapping enslavers whose use almost inevitably leads to despair and degradation.

Thus, as the first major motion picture to specifically call the drug war into question and the latest in a long line to demonize actual drug use, *Traffic* is simultaneously a "breath of fresh air and a...gasp of hysteria," in the words of Associate Editor Jesse Walker (his comments can be read on REASON Online at www.reason.com/hod/jw010501.html). Indeed, only in a context of institutionalized hysteria about illegal drugs—only in a world in which the nation's drug czar signs off on TV scripts, demonstrably worthless programs such as D.A.R.E. put cops in grammar school classrooms, police arrest over a million Americans each year for possession, and tens of thousands of nonviolent drug offenders languish in state and federal prisons—could such a movie have any power at all to move reviewers or audiences.

As *Traffic* unfolds over two and a half hours, we watch the intersection of characters, situations, and insights made familiar from other crime flicks: corrupt Mexican cops and army types who are secretly in bed with drug lords; stupid, overconfident U.S. government officials who gravely misjudge situations only to recognize—too late!—the error of their arrogance; U.S. drug agents conflicted by what they recognize is their impossible mission; ruthless drug traffickers who have grown fabulously rich off their trade and acquired the trappings of legitimate businessmen even as they ruthlessly order the deaths of anyone—anyone!—who gets in their way; and the intimation that illegal drugs are "an unbeatable market force," the very apotheosis of consumer capitalism, which itself seems to bring out the worst sort of amoral greed in people.

Traffic's social-realist impulse reaches its nadir in the plot involving Judge Robert Wakefield (Michael Douglas), a conservative judge from Cincinnati, Ohio, who is named drug czar. Even as he is jetting to

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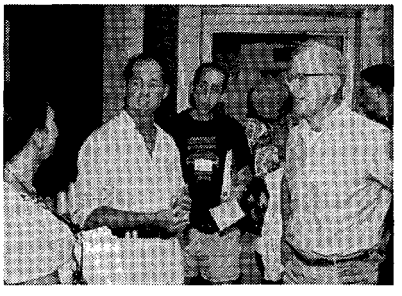

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Washington, D.C., to meet with his new boss and talk interdiction strategy, Wakefield's privileged, high-achieving daughter Caroline enters a whirlwind of drug addiction and sexual degradation straight out of *Reefer Madness.*

Early on, we see her and assorted schoolmates from a tony prep academy, still clad in their school uniforms, killing an afternoon at one of their parent's mansions by smoking dope. Soon enough, a male classmate—ironically played by one of the lead actors from Fox's *That '70s Show*, the only network series that dares admit that using pot can be fun—introduces a willing Caroline to the pleasures of freebasing cocaine. She is immediately hooked, incessantly smoking the stuff and accompanying her friend into the ghetto to cop her next score (what's more, she's always quick to have sex when high).

After a classmate overdoses, her parents put Caroline into a 12-step treatment facility, but she runs away at the first opportunity and heads straight for her dealer, trading her body for highs and becoming an IV drug user to boot. She is fully redeemed only in the penultimate scene of the movie, where she again addresses an audience of fellow addicts at a rehab center.

You could be forgiven for suspecting that such a ludicrously overwrought cautionary subplot might have been inserted just to get the film made. Studio bosses are legendarily gutless wonders and it's easy to imagine them wanting some sort of ham-handed anti-drug message to offset the rest of the movie. However, in interviews Soderbergh has consistently talked about drug use as both a "health care" and "public health" issue. So it's not surprising that Caroline, as the only regular drug user in the film, perpetuates an "instant addict" stereotype that justifies, if not the drug war in its current form, then prohibition or super-strict regulation of everything from marijuana to LSD to heroin.

Indeed, *Traffic* trades heavily in the related and well-worn ideas that drug use is a cry for help—at one point, Caroline avers she is "angry" at the world—rather than an enjoyable pastime; that drug use destroys the will of a user rather than reflects it; and that to use drugs is by definition to *abuse* drugs. These are the beliefs that ultimately underwrite the War on Drugs: After all, if illegal drugs are so powerful that they can turn even good girls from the right families into needy, desperate drug whores virtually overnight, then there is a powerful claim on society to make sure such substances are kept out of circulation. If the privileged few can't handle the stuff, what chance do the rest of us have?

As it turns out, that's a false question. Illegal drugs, after all, are already widely available, even for kids (as one of the characters in *Traffic* puts it, it's easier for kids to score drugs than booze), and research by the RAND Corporation finds that a country's laws play a relatively small role in the decision to use drugs. Yet they remain a temptation for a small portion of the U.S. population. According to the most recent data (1999) from the government's own National Household Survey on Drug Abuse, only 7 percent of respondents 12 years and older reported using "any illicit drug" in the previous month, a figure that has remained relatively constant over the past decade.

More to the point, despite popular images that conflate recreational or casual drug use with debilitating drug addiction, the government's data suggest a very different, though predictable, pattern: Drug use increases from late adolescence through young adulthood before tapering off dramatically. Using 1999 figures, about 9 percent of 12–17-year-olds reported using "any illicit drug" (almost always marijuana) in the past month. The figure was 19 percent for 18–25-year-olds; 9 percent for 26–34-year-olds; and 4 percent for 35-year-olds and over.

Though the overall percentages have changed from year to year (they are down sharply from 20 years ago), the basic pattern of youthful drug use giving way to middle-aged sobriety doesn't vary, strongly suggesting what those of us who have used drugs on a recreational basis know to be true: The overwhelming majority of people who choose to do drugs do less of them as they get older, work longer hours, take on more responsibility, and the like. Not surprisingly, the same pattern holds for rates of "heavy drinking"—defined as "drinking five or more drinks on the same occasion on each of 5 or more days in the past 30 days."

Far from our drugs controlling us, by and large we control our drugs; as with alcohol, the primary motivation in taking drugs is to enjoy ourselves, not to destroy ourselves. Though cultural artifacts such as *Traffic* fail to acknowledge it, much less represent it, there is such a thing as responsible drug use and it is the rule, not the exception. (Even heroin, legendary for its purported addictive properties, does not turn its users into zombies. Though there are no definitive figures on the matter, a widely cited 1976 study found that only 10 percent of heroin users could properly be classified as addicts.)

This is no small matter: The popular front that has long supported the drug war—and its annual $37 billion price tag at the local, state, and federal levels—is beginning to crack. The generally positive response to *Traffic* reflects this, as does the ease with which medical marijuana ballot initiatives pass and the willingness with which politicians ranging from New Mexico Gov. Gary Johnson to the members of the Congressional Black Caucus openly criticize national drug policy.

The debate over drug policy is clearly at an inflection point. But ending the current version of the drug war, with its emphasis on interdiction, law enforcement, and imprisonment, isn't synonymous with the end of prohibition or with drug legalization. That case still needs to be made, perhaps now more than ever.

Nick Gillespie (gillespie@reason.com) is editor-in-chief of REASON.

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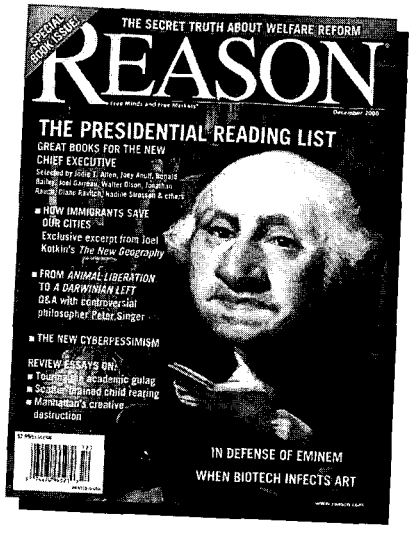
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Scottish-trained child rearing
Manhattan's creative destruction
IN DEFENSE OF EMINEM
WHEN BIOTECH INFECTS ART

Ballot Tampering

As an Arizona resident, I appreciated "Ballot Tampering" by Jeffrey A. Singer (December). This is not the only time the courts have blocked a citizens' initiative effort to curtail state power. About 20 years ago, the National Taxpayers Union led a drive to get the states to petition Congress to call a constitutional convention to produce a balanced budget amendment. California was one of the states holding out. The citizens put an initiative on the ballot to cut off state legislators' pay until they took appropriate action. The California Supreme Court removed that ballot measure, again with no explanation. That was the bad news. The good news: three of the justices responsible for the removal did not win reinstatement when their terms were up.

Albert K. Heitzmann
Phoenix, AZ

Big-Bucks Welfare

I see that welfare reform has moved people into jobs ("The Hassle Factor," December). But the taxpayers are buying welfare recipients cars, paying for their car insurance, schooling or job training, day care, bus transportation, and more. How much does all that cost? Is it more, less, or the same amount as the old programs? I don't care how many people are statistically "former recipients." Welfare is still a big-bucks program. I can't consider welfare reform successful until the taxpayers' burden has been lifted.

Diane Barnes
Eastpointe, MI

The Art of Eminem

Brian Doherty's attack on Lynne Cheney and defense of Eminem ("Bum Rap," December) disturbed me. Doherty overlooks the serious problems with this sort of trash culture, and instead sets up a straw man in Cheney's criticism of nihilistic art.

First off, he implies that Cheney was calling for censorship, which is not true as far as I know. I am dead set against censorship, but holding a firm position in support of artistic freedom does not mean that one cannot pass artistic judgment. I see nothing wrong with public figures using their highly visible positions to encourage greater aesthetic maturity and to discourage the support of nasty, puerile, violent, and intellectually bankrupt influences on our children. No one is obliged to listen to Cheney any more than they are obliged to listen to Eminem.

I was more disturbed by the effort to promote Eminem as a serious artist. I commend Doherty's straightforward honesty in reprinting some of Eminem's lyrics, though they certainly don't help make his case. It surprises me that REASON would fail to connect the self-indulgent attitudes displayed in these lyrics with the ever-growing infantilism in society, which contributes so greatly to the popular demand for Big Daddy Government.

We should be encouraging teenagers to listen to music that stimulates their maturation, not to whining, solipsistic crap aimed at promoting permanent childlike dependence. The problem with "art" of this sort is not that it will produce maniacs who imitate it literally, but that it will stunt the mental development that makes a free society possible.

This so-called musician hides behind ironic detachment and supposed humor so that he can shout out his most childish, violent fantasies. Can anyone really believe "provocation" is an art form? I am well aware that defining the meaning of art is an unsolved—probably unsolvable—philosophical problem. Nonetheless, it seems clear to me that defining as art anything that tweaks the nose of other people renders the concept meaningless.

To me, true freedom is based first and foremost on maturity and responsibility among the people. A society that cannot distinguish between good and evil, or between inspiration and mob incitement, is ripe for manipulation by demagogues. We all have within us the desire to scream and shout, to tear down and destroy, to join the mob and indulge our animal natures. The trick is to learn how to live without expressing these primal urges. Children do not naturally draw this lesson from within themselves; they need to have it taught and demonstrated by their parents and other adults around them.

While I certainly defend the right of Eminem to spew hatred and filth, I will continue to encourage my children and all other people around me to turn their backs on such emanations and instead to develop their intellects and their souls as free, responsible, mature individuals.

Jonathan Taylor
West Newton, MA

I enjoyed "Bum Rap"—the prompting of such thoughtful discussions is one of the few salutary effects of Eminem's music that I can discern.

As a staunch defender of free speech, I do not advocate censorship as an approach to Eminem. But as I see it, his music is less significant for its artistic merits (which I thought were somewhat overestimated in "Bum Rap") than as dire reflections of our condition.

From a historical perspective, isn't there a risk of freedom being lost when its exercise takes too many forms that are too objectionable to too many in the society? Such exercises inevitably and directly elicit the kind of proto-fascist, censorial impulses criticized in "Bum Rap." Eventually, enough people become sufficiently perturbed that they elect, by democratic process, someone who promises to do away with this "rot" and clean up Dodge City. When that happens, everybody loses their freedom, not just those who indulged themselves in its excess. This is why I think intelligent people can reasonably be concerned about the moral stimuli presented to a young, impressionable audience by Eminem—not to mention a host of other offerings which have arisen in our current era.

We shouldn't overlook the fact that Eminem's approach is geared toward profit, not free expression. The latter is something it merely takes advantage of. It reminds me of the saying that we aren't really free at all, unless we're free to abuse our freedom. That position strikes me as intellectually absurd, and ultimately dangerous to the freedom it pretends to support. It bespeaks a demonic impulse to erase any and all boundaries. I quite agree that we have the "modern liberal cant" to thank for the social milieu in which an Eminem rises to prominence.

Doherty rightly characterizes Eminem as annoying, not evil. But something that is not "evil" can still be potentially destructive to the interests of both society and individuals. That said, Eminem is not the disease. He is merely a symptomatic lesion that has broken the surface. Cheney and her ilk may fail to understand this, but I would also caution against the more sanguine view in "Bum Rap." There are two equal and opposite directions in which we can mislead ourselves in the face of phenomena such as Eminem. We might do well to avoid both.

Brian Akers, Ph.D.
Atlanta, GA

I just wanted to let you know how much I enjoyed the article on Eminem. As a feminist and someone who is now considered a "grown-up," I have often found myself looking and feeling quite out of place when I defend Eminem as an artist. As is so often the case when you feel like a lone voice, I found it extremely comforting and encouraging to see someone whose work and ideas I admire making many of the same arguments—and making them so well.

Teresa Brown
Fairfax, VA

I have never been a fan of contemporary rap. I find most of it insulting, both intellectually and musically, with only rare exceptions (for example, Busta Rhymes and Wu Tang Clan when viewed as social commentary; rap will be the Negro spiritual of future anthropologists of black culture). A few weeks ago I heard "Stan" by Slim Shady and I was floored. When I examined the subject matter, I had to go buy Eminem's records. He has a great musical ear and a quicksilver tongue, and he likes to push buttons.

Dale Fitzgerald
Johnson City, TN

Brian Doherty replies: While Lynne Cheney paid the usual lip service to not advocating government action, remember the context of her remarks: a presentation to a committee of Congress, contemplating state action regarding the marketing of disapproved material to children. Cheney did not appear to be making an "artistic judgement" as Mr. Taylor says, but reacting to out-of-context bits of lyrics and ignoring the larger context of Eminem's record—which, as my article tried to demonstrate, deals with the very issues of artists' (and parents') responsibility toward kids with more insight, wit, and nuance than Cheney exhibited. Referring to "provocation" as his chosen art form was an attempt at wit on my part—Eminem is clearly very gifted at it.

I strongly disagree with Dr. Akers contention that it is Eminem's, or anyone's, responsibility to restrict their right to say what they please to appease those who would violently quell speech that offends them.

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Citings

A Riot of Our Own

By Charles Paul Freund

Didn't like the recent anti-globalist, anti-capitalist street actions in Seattle and Washington, D.C.? Then maybe you should have caught New Delhi's riots last November. India's capital was shut down even tighter than the American cities; crowds of rock throwers targeted policemen, not just fast-food restaurants. But the angry New Delhi protesters were neither Greens nor environmentalists, neither anarchists nor even wielders of giant puppets. They were industrial workers, and they were mad because stringent new pollution controls were shutting down their mostly small workplaces.

These workers of the developing world united—with nothing to lose but their jobs—under the banner of the Small Industries Action Front. The specter that was haunting Delhi was an order by India's Supreme Court immediately to shut down factories located in residential areas. An estimated 50,000 workplaces were covered by the order, suggesting two conclusions: that Delhi had been pretty lax in its zoning enforcement for a very long time, and that the court's decision to put matters right overnight was going to lead to considerable disruption for everyone involved.

"We are protecting our basic rights to earn a living," Dinesh Goel, president of the Mahipalpur Industries Association, explained to Reuters. "They are sealing all factories whether they are polluting or not."

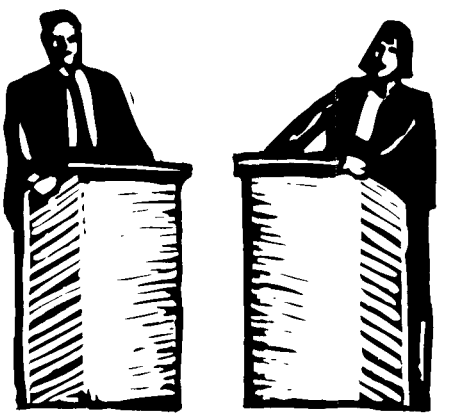
After the first protests disrupted New Delhi traffic on November 19, the city government appealed to the court to allow it to shut down the factories gradually. The court rejected the request. The result was several days of chaos. Industrial workers took to the streets throughout New Delhi, blocking traffic and setting fires. The city was forced to close its schools along with its factories, because students were unable to get to classes. Airline passengers had to abandon their cars and walk to the airport, carrying their luggage, because the airport road was blocked. Police were stoned, answering with tear gas and, at close range, their clubs. The worst violence occurred on the first day of demonstrations, when 75 people—half of them police—were injured, and one person was killed.

Air Commands

By Jacob Sullum

You may have heard that the Fairness Doctrine, which required broadcasters to provide balanced coverage of controversial topics, was abolished 14 years ago. Not quite.

In 1987 the Federal Communications Commission concluded that the requirement, first officially enunciated in the 1940s, had deterred TV and radio stations from dealing with issues of public concern: Broadcasters had steered clear of controversial discussions and provocative commentary because they were worried about possible disciplinary action. The FCC also noted that the proliferation of media outlets had made a legal mandate for diversity of viewpoints obsolete.



But the commission continued to enforce two narrower rules that posed similar threats to freedom of speech: the "political editorial rule," which required stations that criticized a candidate or endorsed his opponent to let him respond on the air, and the "personal attack rule," which gave the same right to individuals or groups whose "honesty, character, integrity, or like personal qualities" were impugned. The commission was never able to explain why these rules were not

Balance Sheet

By Jeff A. Taylor

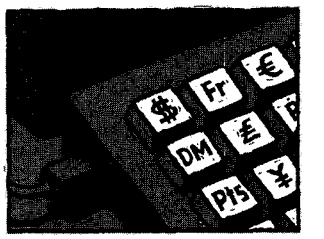
ASSETS

△

▲ Trending Up. By 2015, "Governments will have less and less control over flows of information, technology, diseases, migrants, arms, and financial transactions." Or so says a 70-page CIA report on the future. Globalization is to blame, and five out of six ain't bad.

△

▲ Scared Simple. Net transactions spur states to pursue tax simplification. Thirty-nine states form the Streamlined Sales Tax Project to come up with ways to nix confusing cross-jurisdictional taxes.



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▲ Merge Urge. The Federal Trade Commission resists the doomsday lobbying of Walt Disney and others by voting unanimously to approve the AOL-Time Warner merger. But expect fighting over the "open access" mandate the FTC wrangled from America Warner On Time.

△

▲ Child's Play. Juvenile homicide arrests fall to their lowest rate in decades; overall youth crimes drop, too. Some 1,400 youths between 10 and 17 were charged with murder in 1999, a 68 percent drop from 1993. The youth violent crime rate is the lowest since 1988.

△

▲ Teaching Moment. The Equal Employment Opportunity Commission backs an Ohio teacher who wants the portion of his union dues spent on political activities sent to a charity, as labor law allows. Denis Robey wanted his money to go to Habitat for Humanity, but union officials threw up roadblocks.

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▼ Crippling News. Forty-five cases of polio crop up on the Caribbean island of Hispaniola in recent months. An under-vaccinated population is to blame, suggesting the plan to wipe out polio within the next two years is in jeopardy.

▼ Cola Nuts. Coca-Cola buys its way into the Library of Congress with a "donation" of 20,000 TV commercials and $100,000 to fund the study of culture. Up next, "Tastes Great" and "Less Filling" wings for the library.

▼ On Principals. Public school administrators go rule crazy. In separate incidents, a 14-year-old boy is charged with criminal sexual contact after slapping another 8th-grader on the butt and a 10-year-old boy is strip-searched by school employees looking for cigarettes. In both cases, higher-ups defend the actions.

▼ Syndrome Syndrome. Belgian and Italian soldiers complain of "Balkans syndrome," allegedly brought on by depleted uranium shells used by NATO in the region. Chronic exhaustion, depression, and lethargy must be caused by something other than a soul-sapping mission.

▼ Money Run. Since 1996, about 25,000 fugitives from felony charges got Supplemental Security Income checks from the Social Security system. Between $76 million and $283 million meant for the poor and disabled helped fund getaways, an internal audit finds.

▼ Hatch Hash. The chief of the Health Care Financing Administration, which sets government prices for health care, is forced to resign for violating the federal law that prohibits political fundraising by federal employees. Michael M. Hash held an event for a Democratic House candidate, something even postal workers know runs afoul of the Hatch Act.

LIABILITIES

just as unnecessary, counterproductive, and unconstitutional as the Fairness Doctrine itself.

In October, noting the continued inadequacy of the FCC's defense after many years of litigation, the U.S. Court of Appeals for the D.C. Circuit ordered it to rescind both regulations. The commission had announced a 60-day suspension of the rules a week earlier, but the court saw that move as too little, too late. "The petition to vacate the rules has been pending since 1980," the judges noted. "If these circumstances do not constitute agency action unreasonably delayed, it is difficult to imagine circumstances that would."

Ring of Power

By Jeff A. Taylor

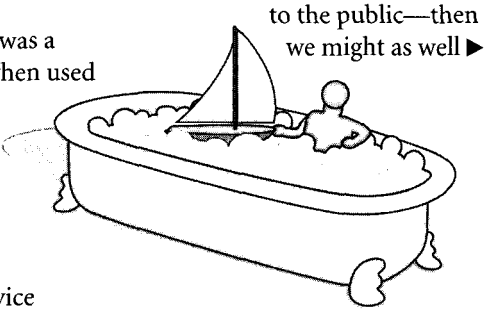
Suppose there was a device that, when used during a dangerous procedure, significantly reduced the risk of a fatality. Suppose that same device also made a difficult procedure much easier. What would you think of it?

If you're a member of the Consumer Product Safety Commission, you might decide to outlaw it. Such is the case with baby bath seats, some 2 million of which are now in use.

The Consumer Federation of America is campaigning to ban the devices, saying they give parents a false sense of security. But the numbers don't back up that claim. Each year 50 or so kids drown in bathtubs. Usually less than 10 of those accidents involve the use of a bath seat. Significantly, in almost all of the reported deaths, the child was left unattended. Blaming the bath seats for this lapse in parental judgment seems more than a little misplaced.

But not for CPSC Chairman Ann Brown, who seems to think that making life difficult for parents will keep kids safe. "Imagine a parent holding a soapy, squiggling baby," Brown said. "A parent would never leave that baby alone for a second. But even the best parent can be seduced into bad behavior if they see a child sitting upright in a little seat."

That is one powerful piece of plastic, able to "seduce" even "the best parents" into a "bad" choice. If that is the operating standard for safety —that no labor-saving device that might be misused by morons should be available to the public—then we might as well ▶



SOURCE

"Growth in computer adoption in lower income households is nearly double that of the higher income bracket, showing that **the 'digital divide' is closing rapidly as technology becomes more affordable.**" So concludes a new study by the nonprofit Employment Policy Foundation, which predicts that by 2009 the gap between high- and low-income households in computer ownership will have completely disappeared. The study, available online at **www.epf.org/forecasts/2001/tf20010112.pdf**, also predicts that telecommuting will be ubiquitous by the end of the decade.

QUOTE

"If that little powder was worth only 10 cents, **there would be no organizations dedicated to raising a billion dollars to finance armies in Colombia.**"
—Jorge Batlle, president of Uruguay, urging fellow Latin American leaders to consider the decriminalization of drugs, at the Iberoamerican Summit of Chiefs of State and Government, November 20, 2000

BRICKBATS

◆ Zerubbabel Emanuel Evans isn't dead—but try telling that to the government. The Social Security Administration declared the Ohio man deceased, then seized $2,600 from his bank account to recoup payments made after he "passed away." Then Medicare dropped his coverage. The SSA said that it will correct the problem, but Evans needs to meet an agent in person and bring a photo I.D. to prove he is alive. The agency required no proof—such as a death certificate—to declare him dead.

◆ Sting: international pop superstar—and victim of human rights abuses? When the British air force announced plans to extend a runway on a base near the singer's home, he sued the Ministry of Defense under the nation's Human Rights Act. Sting says the increased noise would infringe on his rights of privacy and family life.

◆ When the Cooper High School baseball team needed to raise money for repairs to the home field, they decided to sell a poster of themselves. And what better way to call attention to their heavy hitters than to pose, holding weapons, with a National Guard tank? The poster declared that the Texas team was "Armed and Dangerous." Of course they got complaints, but school officials don't see the problem. "At the time, we weren't thinking about school violence," said school superintendent Pat Henderson. "We were thinking military."

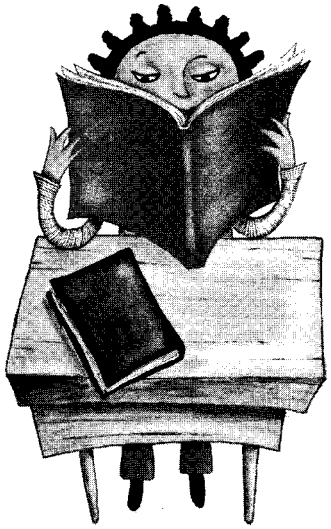
go back to mud huts.

Voucher Wars

By Sara Rimensnyder

Four thousand kids participating in a Cleveland voucher program will have to return to public schools if a December ruling by a federal appeals court in Cincinnati sticks. Most of the families in the pilot program have enrolled their children in religious schools, allowing the plaintiffs—a collection of voucher opponents, including the Ohio Federation of Teachers—to argue that the program steps over the line separating church and state.

On its face, the case suggests grim prospects for the



program. But school choice advocates plan to appeal to the Supreme Court. In the words of Matthew Berry of the Institute for Justice, the public-interest law firm that is defending the Cleveland plan, "This very well may be the case that determines the constitutionality of vouchers."

That's assuming, of course, that the Supreme Court agrees to hear it. If it does, Berry's clients have good reason for optimism. Previous cases suggest that the justices interpret the First Amendment as simply requiring the state to remain neutral toward religious schools—a test the Cleveland program clearly meets.

In November, the justices voted 5-to-4 to grant a stay letting the program continue while the matter moves through the legal system. According to Berry, the earliest we're likely to see the case before the Supreme Court is October.

Caesar vs. Christ

By Brian Doherty

Pastors and congregants of the Indianapolis Baptist Temple had been holed up inside their church for over 50 days as of early January, awaiting an inevitable assault by federal marshals—not because of suspected illegal weapon sales or child abuse, but because of unpaid taxes.

In 1986 the church decided, to quote one of its press releases, that "a true New Testament Church is not an employer nor does it have employees. Neither is it a taxpayer. Those who serve the church are ministers exercising their gifts by the Holy Spirit. They receive love gifts, not wages." (Another statement on the church's Web site refers to Indianapolis as "the syphilis capital of America." The church's pastor, the Rev. Greg Dixon, believes his congregation's old-fashioned biblical Christianity might have motivated the federal government to target

☛ "One need not be an incurable cynic to suspect that campaign contributions induce politicians to support policies they would otherwise oppose. On the other hand, if the public good happens to coincide with the best interests of major contributors, well, needless to say, this happy coincidence of interests occurs quite often between the dairy industry and the federal government."

—Michael McMenamin, "Milk, Money & Monopoly"

☛ "I oppose gun control for the same reason that I oppose censorship, antimarijuana legislation, or any other victimless crime laws."

—Donald Feder, "A Libertarian Look at Gun Control"

☛ "Doug Kennell, alias Jean Freeman, alias Jean Berkman, was arrested by the FBI for violations of the Selective Service Act....The case is interesting...for several reasons, but most specifically because [Kennell's] defense will be based primarily on the 13th Amendment."

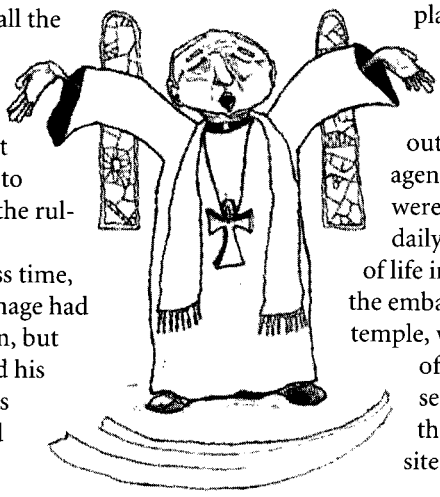
—Joe Cobb, "Frontlines"

it.) So the temple stopped withholding money from its ministers' "love gifts" to deliver to the Internal Revenue Service.

Dixon was reached on his cell phone as he and anywhere from "50 to 250 people" stood vigil. (People were still entering and leaving the temple unmolested, even though the deadline to surrender it had passed more than a month before.) "We are making a stand," Dixon said. "We are in the building 24 hours a day, waiting for marshals to come and to remove us bodily from church."

Dixon insists that everyone receiving money from the church paid their own taxes properly and in full. He also says that nearly 60 IRS audits of church ministers have not found any of them to owe unpaid taxes. The IRS refuses to comment on anything concerning the case.

On September 28, U.S. District Judge Sarah Evans Barker issued an order declaring that the church and the parsonage (where Dixon's elderly parents had lived for 32 years) should be surrendered to the government on November 14, in partial payment of the nearly $6 million in back taxes, interest, and penalties the church owes the government. The church has appealed all the way to the U.S. Supreme Court, but has failed to overturn the ruling.



At press time, the parsonage had been taken, but Dixon and his supporters continued to occupy the church, where they planned to remain until forced out by federal agents. (They were posting daily accounts of life inside the embattled temple, with details of Dixon's sermons, on their Web site, www.indianapolisbaptisttemple.com.) Speaking by phone, Dixon insisted he wanted no violence, saying the occupants would leave—or, if they preferred civil disobedience to the end, allow themselves to be dragged out and arrested—when the federal agents decided to charge in.

DATA

Feeding Time

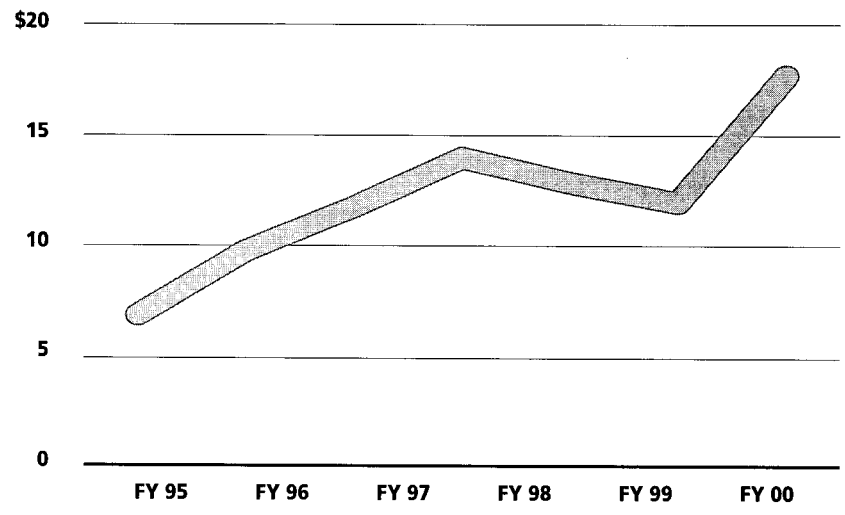
By Michael W. Lynch

In a town where a pile of new laws and programs is considered progress, grousing is often heard about the "do nothing" Republican Congress. If only it were so.

The GOP has mastered the art of legislating in at least one area: pork-barrel spending. In fiscal year 1995, the last year the Democrats controlled congressional spending, members reached into the public purse for $6.9 billion in highly dubious spending programs specifically earmarked for the districts and states of influential legislators. In fiscal year 2000, the last year for which there is finalized data, legislators doled out a record amount of such pork, with a total just under $18 billion.

Congress has almost certainly broken that mark in fiscal year 2001, whose budget was decided late last year, by funding such projects as a documentary titled *The Appalachians*, and a monument to Dr. Seuss in Springfield, Massachusetts. "We're at $16 billion with five appropriations bills left to analyze," says Sean Rushton, spokesman for Citizens Against Government Waste, a D.C.-based group that tallies up federal spending. "We expect it to come in at roughly $20 billion."

Pork-Barrel Spending by Congress, FY 1994–FY 2000
(in billions of dollars)



Source: Citizens Against Government Waste

Jerk Protection

By Jacob Sullum

"It was not a proud moment for the City of Lago Vista." That's how three judges on the U.S. Court of Appeals for the 5th Circuit summed up Gail Atwater's encounter with local police officer Bart Turek on the afternoon of March 26, 1997. Atwater was driving through the Austin suburb when Turek pulled her over: She, her 4-year-old son, and her 6-year-old daughter were not wearing seat belts. But instead of simply issuing a citation, Turek handcuffed Atwater and hauled her ▶

BRICKBATS

◆ Top officials in the Army Corps of Engineers rigged data to justify a proposed $1 billion lock expansion on the Mississippi River, according to the Army's inspector general. The report also found that intense pressure from the top ranks has created an agency-wide bias toward favorable evaluations for all river construction projects. The corps is supposed to recommend only projects which have a large net benefit to taxpayers. Experts say that the report probably won't lead to meaningful reform, since the Army is under intense pressure from members of Congress to approve projects for their districts.

◆ Is bigotry on the Internet a problem? The Simon Wiesenthal Center says that it is, and it compiled a list of 3,000 sites called "Digital Hate 2001." But the center seems to have a broad definition of "hate." Many mainstream conservative and pro-gun groups were listed alongside white supremacists and neo-Nazis. Among them: the popular news site *WorldNetDaily*, Women Against Gun Control, and the conservative think tank the Free Congress Foundation. Following complaints, the center pulled the list from its site and promised to review it before releasing a revised version. But it refused to answer questions about how it compiled the list or how it defined a hate site.

—Charles Oliver

down to the police station.

There Atwater was forced to remove her shoes and glasses, empty her pockets, and pose for a mug shot. She was confined in a jail cell for about an hour before seeing a magistrate, who released her on $310 bail. Later she paid a $50 fine, the maximum penalty, for each of the three seat-belt violations, plus a $110 towing fee for her pickup truck.

Since then, Atwater and her husband have spent a lot more money trying to convince a court that Turek violated her constitutional rights. A federal district judge dismissed their lawsuit against the officer and the city, a three-judge panel of the appeals court reinstated it, and the full court threw it out again. Now the U.S. Supreme Court is considering whether to let the case proceed.

The Court's decision probably will hinge on whether it thinks the Fourth Amendment allows custodial arrests for minor traffic offenses in the absence of special circumstances. Atwater argues that the justices should look to the common law standard that prevailed when the amendment was drafted, which held that police may not arrest people for misdemeanors without a warrant unless a "breach of the peace" has been or is about to be committed.

"You've got the perfect case!" Justice Sandra Day O'Connor told Atwater's attorney during oral arguments, perhaps impressed by the evidence that Turek had, in a 5th Circuit dissenter's words, inflicted "vigilante punishment on a citizen under the guise of an arrest." Justice Anthony M. Kennedy was less impressed, declaring, "It's not a constitutional violation for a police officer to be a jerk."

Moving Words

By Jacob Sullum

Imagine you're sitting on a bus or a train. You look up and, amid the ads for ambulance-chasing attorneys and laser-wielding dermatologists, notice a picture of two police officers. The text reads, "Police are too important... to waste on arresting people for marijuana when real criminals are on the loose."

Boston transit officials are determined to stop that scene from becoming a reality. Change the Climate, a Massachusetts-based drug policy reform group, tried to buy space for the message on buses and trains in Boston, but the Massachusetts Bay Transportation Authority turned it down. The MBTA also rejected two other ads: one featuring a mother who declares that "jail is a lot more dangerous than smoking pot," the other showing a teenager who says, "Smoking pot is not cool, but we're not stupid, ya know. Marijuana is NOT cocaine or heroin."

Now Change the Climate is challenging the Boston decision as a violation of the First Amendment, and it has got a good shot at winning. (The Washington, D.C., transit authority, which initially rejected the same ads, relented in September, convinced that it could not withstand a First Amendment challenge; the ads started appearing in January.) Federal judges have repeatedly rebuked the MBTA for turning down controversial ads, and at least three appeals courts have found that public transit advertising space can qualify as a "designated public forum," triggering "strict scrutiny" of content-based speech restrictions.

Even if the MBTA convinces the courts that it does not operate a public forum, its decisions about which messages to allow must still be "reasonable," and it may not discriminate based on viewpoint. That is exactly what the MBTA appears to be doing, since it gladly runs ads from the Office of National Drug Control Policy and the Partnership for a Drug-Free America. As MBTA spokesman Brian Pedro told National Public Radio, "You have to draw the line somewhere."

Reason of the Witch

By Brian Doherty

Can witchcraft triumph over a politically connected teachers union? Robert L. Hurt, an accounting professor at California State Polytechnic University, is pitting his Wiccan faith against the California Faculty Association. Hurt doesn't

actually belong to the union, but because he is a state employee, money is withdrawn from his paycheck and given to the CFA. (Under California's Higher Education Employment Relations Act, all state university employees must pay dues to the union even if they aren't members.) Hurt asked the union if he could instead pay the money to a charity of his choice, but it denied his request. The professor then wrote to the Equal Employment Opportunity Commission, which advised him he had a potential legal action under Title VII of the 1964 Civil Rights Act, which prohibits religious discrimination on the job.

The central tenet of Wicca, known as the "Rede," commands that believers "do no harm." Hurt thinks union activities cause economic harm to both members and nonmembers through state-enforced dues payments. Hurt filed suit against the CFA in November. He is represented by Bruce Cameron, a lawyer with the National Right to Work Legal Defense Foundation. Cameron says he's won plenty of similar cases on Title VII grounds.

"Title VII requires employers and unions to accommodate religious beliefs if it doesn't cause undue hardship," Cameron says. "The most common solution is to allow the employee to redirect union fees to a charity. That's been accepted in case after case. What is different about this case is the nature of the employee's religion." The union has until mid-January to respond to the filing. Cameron expects it will attempt to deny that Hurt's outré faith is a real, sincerely felt religious creed.

SOUNDBITE

Independent Airwaves

By Jesse Walker

DREW YENCHAK

Jerold Starr

Few people expect critiques of public broadcasting to come from the left, and certainly not from a leftist who reveres the idea of noncommercial radio and television. But Jerold Starr, author of *Air Wars: The Fight to Reclaim Public Broadcasting* (Beacon, 2000) and founder of Citizens for Independent Public Broadcasting (cipbonline.org), wants to replace the Corporation for Public Broadcasting with an independent body. That way, he argues, controversial and uncommercial material can be aired without political interference. How would the new system be financed? That's a matter of debate within Starr's group, with some favoring a semi-public system funded by a levy on commercial broadcasters and others backing a completely independent trust.

Starr, 59, divides his time between Washington, D.C.; Morgantown, West Virginia; and Pittsburgh, Pennsylvania, where Associate Editor Jesse Walker reached him by phone late last year.

Q: What's the purpose of your group?

A: It operates on two levels. We want to restructure public broadcasting as an independent public trust, so it has the financial security required for editorial integrity—we would in effect take the government and the corporations out of direct funding of programming. The trust would provide roughly $1 billion a year in program funds, which would be five times what it currently spends.

The second level is democratizing local stations, so they are more responsive to and reflective of the community.

Q: Where would the money come from?

A: That's the most contentious issue within the larger coalition we're trying to organize. There are some who say, look, we've got a $1–2 trillion budget surplus at the present time. Roughly $20 billion invested would create a billion dollars a year in perpetuity.

My preference is that the money would come from commercial broadcasters. I know you guys don't like taxes. I myself am basically an anarchist. But I view the commercial broadcasting industry as an enormous case of corporate welfare. It is the only industry that pays the government no use fee for a public resource.

Q: What isn't on public broadcasting now that you'd expect to see more of under your system?

A: Independent producers have an extremely difficult time getting their films on PBS. To add insult to injury, PBS has subcontracted two episodes of *Frontline* to *Nightline.* The Disney Corporation and their $7 million anchor is taking public money to produce a program!

Public affairs, civic education, news, documentaries—these are the things that public broadcasting can do that none of the cable channels can. Cable has ripped off the most popular genres of public broadcasting, whether it's history, nature, cooking, or whatever, and they do them as well, if not better. If public broadcasting wants to have a unique identity—to use their terminology, a *brand*—it should be the place where you can hear debate and discussion on controversial issues.

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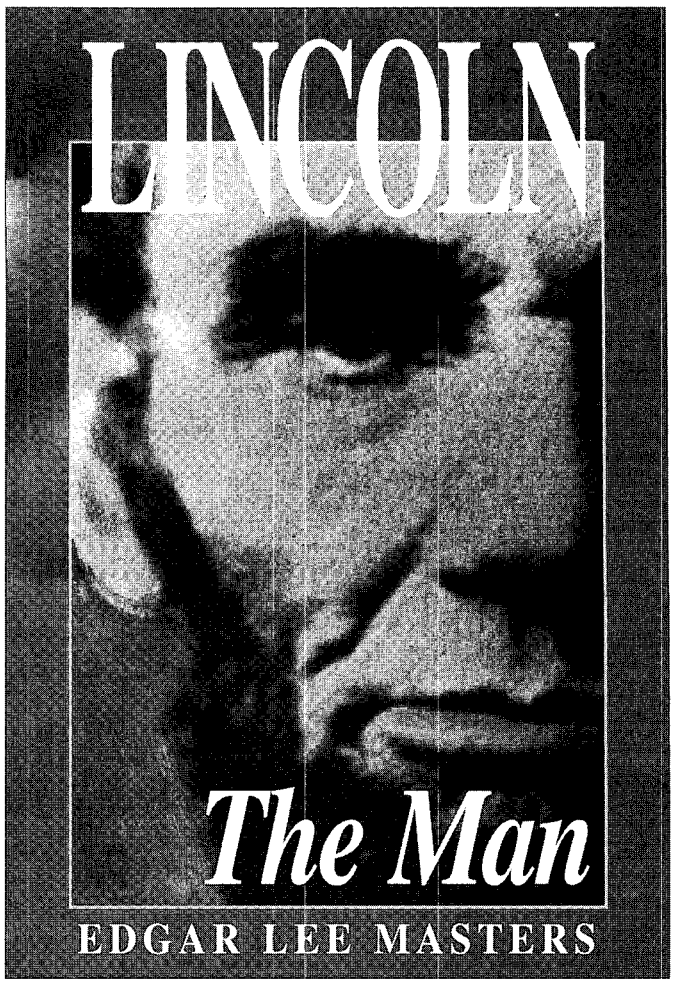

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D.C. Downers

In which our man in Washington listens to the drug czar babble and learns why we can't afford tax cuts.

By Michael W. Lynch

Subj: The general's will
Date: 12/19/2000
From: mwlynch@reason.com

Spent a morning last Tuesday at the Heritage Foundation, listening to the outgoing drug czar, Gen. Barry R. McCaffrey. Heritage billed the speech as, "Is Our Balanced Approach to the War on Drugs Working?" McCaffrey, who prefers assertions to questions, made the title declarative: "Our Balanced Strategy Against Drugs Is Working."

Let me admit a bias of my own: Long before I spent time in Santa Fe talking with New Mexico Gov. Gary Johnson about how much fun, if arguably counterproductive, it is to get stoned, I felt the drug war's insistence on jailing people for sensory enhancement is a waste of human effort (see "America's Most Dangerous Politician," January). Still, I was surprised to find just what an idiot McCaffrey is in person.

HENRY PAYNE

Like drug dealers, McCaffrey targets America's youth. "The whole notion of prevention and education, aimed at getting American adolescents from the 6th grade through 12th grade, where they are reduced exposure to gateway drug taking behavior," he said in a moment of what passes for clarity. "That's the heart and soul of our national drug taking strategy."

As you can see, McCaffrey expresses his concern for youth via a strange bureaucratic speech pattern that exhibits a Bushian inability to form coherent sentences. Hence, 8th graders end up "encountering drugs in our society" and getting "wrapped up and end up in a statistically enhanced probability of being engaged in compulsive drug taking activities as young adults." Still, some of what he said reassured me. "You are statistically not going to get to age 30 and develop a cocaine habit, or start experimenting with heroin," said McCaffrey, which means I'm out of the most dangerous neck of the woods.

More worrisome was his larger world view, a perspective that is neither unique to McCaffrey nor likely to change with the new administration. The general's favorite refrain is "We're moving in the right direction," which I think he really believes. We're moving in that direction because after years of increases, drug consumption by youths appears to have leveled off. More important, to achieve this we are increasingly giving the state tremendous powers and resources. "We have billions of dollars flowing into these programs," McCaffrey said, adding without irony: "Some of them kind of creative."

It's not just insipid social programs that "vector you back to your community anti-drug coalition" that McCaffrey wants. When he became drug czar, the United States employed only 3,000 people as border guards. Today, he says we're up to 7,000. He thinks 20,000 would be a good number. He likes the increase in prisoners, too. "The Drug Enforcement Administration, backed by the CIA, the FBI, and the armed forces, are working vertical integrated crime organizations pretty effectively. That's why our federal prison population has gone up substantially, 120,000 people behind bars, two-thirds there for drug-related offenses, and there's room for more," said McCaffrey, emphasizing *room for more.*

"This isn't a problem to solve; it's a system to put in place," he explained. And what a system it is: On top of tens of thousands of border guards, hundreds of thousands of prisoners, and countless international anti-drug military excursions, children are propagandized in school on the dangers—some real, some make-believe—of drugs, prisoners are released under supervision for one to five years of regular drug testing, and insurance companies are forced to pay for extensive mental health and drug treatment services.

The system offers one more thing: a safe haven for politicians who, like other members of the power class, are likely to use drugs in their youth without fear of going to jail like common citizens. Asked about Bush's alleged and Clinton and Gore's acknowledged drug use, McCaffrey responded, "We went through an irresponsible period in the 1970s and 1980s, and lots of Americans used marijuana in particular, and that includes some of our leading public figures. I want to stop asking them whether they smoked a joint in 1972. Unless they've got a medical, social, or legal problem, which they should share with us, I want to get the conversation on what do you think, Mr. or Ms. Politician, ought to be our policy—and do you commit yourself by your example to supporting that policy?"

In other words, as long as politicians promise not to question whether drug use is a medical or social problem and pledge to keep it a *legal* problem, they're home free. Too bad that's not an offer available to the rest of us.

Subj: Tax cut time?
Date: 1/4/01
From: mwlynch@reason.com

The coming Bush-Cheney regime is dominating D.C. in every possible way, from the city's policy agenda to its fashion sense to its annoying slang. Newt Gingrich's annoying verbal tic "frankly" (a reliable sign that one was about to be lied to) has been replaced with Dick Cheney's "Big Time."

This is one conclusion I came to during a briefing sponsored by the Center on Budget and Policy Priorities at the National Press Club. The CBPP is an impressive left-of-center think tank whose mission is to construct sound arguments on why every policy put forward by a Republican is impractical, unworkable, and dangerous.

With a Bush administration on tap, the CBPP is emphasizing the fleeting nature of the surplus, so as to head off any tax cuts. Hence the title of the featured paper, written by CBPP Executive Director Robert Greenstein: "Can The New Surplus Projections Accommodate a Large Tax Cut?" Any guesses on the answer? In support of his *No* in thunder, Greenstein brought along William Gale, an economist at the Brookings Institution, and Robert L. Bixby, the executive director of the Concord Coalition, a green-eyeshade group that's useful when new spending programs are on the table but worse than worthless when tax cuts are imminent.

And they are imminent. Bush has shocked Washington by giving every indication that he plans to actually put forward the platform on which he campaigned. You may recall, however vaguely, that a broad-based, $1.3 trillion, 10-year tax cut was central to Bush's agenda. Liberals are at pains to make the case that America just can't afford this or any meaningful tax cut. With projected surpluses of at least $3 trillion, that's a tough, but not impossible, case. They must simply discredit the 10-year surplus estimates, which are of course wild guesses at best.

Greenstein, who was dressed in Cheney style with a blue-on-blue shirt and tie got right to it. We don't really have $3 billion coming in, you see, because of all the things the Congressional Budget Office doesn't take into account, like Congress's current spending spree.

There's also the problem of the Alternative Minimum Tax, a nifty device passed way back to ensure that fat cats pay their fair share of taxes. If it isn't adjusted and indexed for inflation, it will soon whack the daylights out of middle-class families. (Said Greenstein, "The Alternative Minimum Tax is going to invade the middle-class. Big time.") Once "realistic" adjustments are made to the CBO's totally phony numbers, the usable surplus is down to $1.5 trillion to $2 trillion.

And that's just the half of it. After a few adjustments to Bush's tax plan—the largest being a shift in the 10-year period from 2000 to 2010 to 2001 to 2011—he finds its costs have increased to $2.1 trillion. It seems the Texan has champagne tastes and a beer budget. A tax cut, intoned Greenstein, would be an "irresponsible" indiscretion.

Greenstein was the optimistic one. The Concord Coalition's Robert Bixby felt compelled to explain his group's continued existence, saying people are always asking why the organization still exists, since it was founded to fight deficits and they are long since history. "The goal was never to just balance the budget but to develop a sustainable fiscal policy," he said, before adding, "We don't want to just look at 10 years." And sustainable fiscal policies don't seem to include letting Americans keep more of their money.

For his part, Brookings' William Gale said we wouldn't even have a surplus if not for bogus government accounting methods. When he looks out 100 years, he says we're really screwed, and not because we'll all be dead and our great grandchildren will be richer than we ever were. "The surplus is a problem because it makes it difficult to impose discipline on the budget," said Gale, whose main contribution to the briefing came when he ran through the arguments likely to be used for tax cuts. He said Bush is like a realtor selling a house: It's always a good time for a tax cut. "Either a boom or bust justifies tax cuts in their eyes," he said.

We don't need tax cuts to ward off a recession, Gale said, since the money won't get to folks quickly enough to do any good. And don't even get him started on the argument that since we raised taxes to *end* the deficit, we should *cut* them to end the surplus. Those deficits were a cash-flow crisis, he said, and the surpluses are a cash-flow windfall. We need to keep the money coming in to cover the long-term structural problem, which, I gathered from his comments, is that the federal government still lets the average American keep roughly 75 percent of her income.

You think taxes need to be cut because they're at an all-time high, right? Well you're wrong! said Gale. All but super-rich Americans are paying less in taxes today than in recent history. The big money comes from those at the top, whose rates were bumped in the early '90s, and who nevertheless continued to work and earn a bunch of money.

I don't recall him offering an answer to the last argument he presented: "If the government doesn't give it back, it'll just blow the funds." Now, you'd think that a fella whose highest political value is that the federal budget be balanced for the next 100 years would be extremely concerned about Congress frittering away today's windfall on new programs (which they surely would do). Taxes, after all, can be raised easier than a program can be cut. But Gale curiously seemed far more frightened by the possibility that Americans might get to keep some of their money—er, the federal surplus.

But that's his problem. He finished on an upbeat note—upbeat for me, if not for him and his fellow presenters: "We're going to have a tax cut," he announced.

Reality—never a welcome stranger to Washington—is starting to settle in.

Walter Olson

Overlawyered & Overgoverned

An annual helping of tales from a litigious society.

How were we governed, regulated, policed, lawyered, and judged in 2000? Sadly, much the same as in 1999. Here are some of last year's month-by-month "highlights":

January: New York City announced that it did not intend to give back the brand-new $46,000 Ford Explorer it had seized from 34-year-old construction worker Joe Bonilla after his arrest on drunk-driving charges, even though Bonilla had been found not guilty of the charges.

A husband and wife filed a million-dollar lawsuit against the University of Miami School of Medicine for failing to warn them that their daughter might be born with Down Syndrome even though the school knew that they were first cousins to each other, a "high-risk" category that often prompts additional precautionary testing. (The couple's grandparents are also first cousins to each other.)

Serious fire code violations, including lack of smoke alarms in sleeping quarters and an improperly installed firewall, threatened to delay the ribbon-cutting of a $1-million public facility in Charleston, West Virginia. The facility was a fire station.

February: Escaped Bulgarian murderer Mincho Donchev, who lived for 10 years as a "mountain man" burglarizing vacation cabins in the Cascade Mountains of Washington, won a $412,500 settlement in his lawsuit against Snohomish County for excessive force in his arrest. A police dog had mangled Donchev's foot as officers tried to subdue him. At the time of the arrest, Donchev was armed with knives, handguns, and a pronged stick. Donchev's attorney said the money would help ease his client's re-entry into society on his release from prison.

Former Chicago city treasurer Miriam Santos, once a rising political star, "blamed her now-overturned conviction on extortion charges on pre-menstrual syndrome," reported UPI. "I am human and probably the first woman to go to jail for PMSing," she told a news conference.

ABC confirmed that it had paid $933,992 to Mark Sanders, an employee of the Psychic Services Network. A jury endorsed Sanders' complaint that the network's newsmagazine *PrimeTime Live* had harmed his reputation in 1993 when it covertly videotaped him and his colleagues working the phones and aired the resulting tapes in a show designed to depict the call-a-psychic business as "a scam and illegitimate."

March: The Equal Employment Opportunity Commission argued before a federal appeals court that Conrail violated the Americans with Disabilities Act when it denied a dispatcher's job to an employee with a heart condition that can cause him to black out. According to the *Detroit News*, the agency told the court "that 'while consciousness is obviously necessary to perform' train-dispatcher tasks, 'it is not itself a job function.'...The [job] involves directing trains and taking emergency action to prevent crashes."

Salon reported that New Age alternative medicine advocate Deepak Chopra, who says he won a $1.6 million settlement in his defamation suit against *The Weekly Standard* a while back, described the legal action as "an act of love" meant to lift the magazine to "a higher state of awareness."

Ed O'Rourke sued Tampa Electric, along with six bars and stores that sold him alcoholic beverages, over a 1996 incident in which he was blasted by 13,000 volts of electricity after breaking into a fenced, gated, and locked utility substation and climbing up a transformer in what he termed a "drunken stupor."

April: Four New Jersey kindergartners were given three-day suspensions after they pretended their fingers were guns and played at shooting each other in a game of cops and robbers. "This is a no-tolerance policy. We're very firm on weapons and threats," said district superintendent William L. Bauer. "Given the climate of our society, we cannot take any of these statements in a light manner."

A Norwich, Connecticut, couple sought $21 million in damages from Publisher's Clearing House, the magazine sweepstakes company, saying that its repeated notices marked "Document of Title" and "official

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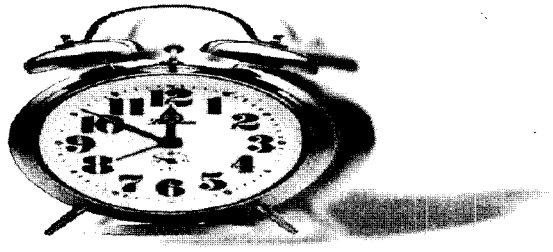

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correspondence from the Publisher's Clearing House board of judges" with messages such as "Congratulations! Your recent entry was a winner! And Approved for $21 Million!" convinced them that they would receive the grand prize in person on Super Bowl Sunday. They even got all dressed up to wait for the knock on the door, but it never came, resulting in devastating emotional distress.

Vili Fualaau, now 16, who figured in national headlines because of his affair with his former grade school teacher, Mary Kay Letourneau, is seeking damages from his suburban Seattle school district because it had not prevented the relationship. All parties described that relationship as consensual.

May: Rob Barry, who has sold peanuts for 19 years in the stands at Boston's Fenway Park, said he may retire in response to an order from management forbidding him from tossing the packaged legumes across rows of seats to buyers. The Aramark company, which runs the food concession, is worried about being sued by a bystander hit by a flying goober bag.

The Internal Revenue Service agreed to stop dunning a New Mexico businessman who inadvertently dropped a fractional penny while calculating his tax return and as a result came up one cent short. Counting penalties and interest, the IRS had been trying to extract $286.50 for the one-cent error.

June: A judge reinstated a foreman at an Omaha wastewater treatment plant after he'd been caught on hidden camera repeatedly taking naps at work. The city had not properly disclosed the evidence against him before a pre-termination hearing, said the judge. The worker also claimed that his persistent dozing was the result of a sleep disorder.

Marthe Kent, director of the Occupational Safety and Health Administration's safety standards program and head of the agency's controversial ergonomics initiative, told a trade publication that issuing a regulation "is a thrill; it's a high." She added: "I love it; I absolutely love it. I was born to regulate. I don't know why, but that's very true. So as long as I'm regulating, I'm happy."

A court in Sydney, Australia, awarded the equivalent of $15,600 in compensation to a spa masseuse who said she suffered

stress and depression from having to hear clients gripe about their personal problems.

July: Just as the federal government geared up a big campaign to raise the alarm about private Web sites that purportedly invade visitors' privacy by using "cookies" to track their movements, it was revealed that dozens of federal agencies' sites use cookies to track visitors, including visitors seeking information on such sensitive topics as drugs and immigration.

The Washington Post reported that most of the campaign Web sites of politicians who vocally support disabled rights fail to heed even minimal guidelines for disabled accessibility. Among the sites in question were those of George W. Bush, Hillary Clinton, and Ralph Nader.

Most campaign Web sites of politicians who vocally support disabled rights fail to heed guidelines for disabled accessibility.

Disabled activists in New Haven, Connecticut, lodged a complaint against the schooner *Amistad*, a traveling historical exhibit, saying it was not wheelchair-accessible. The original *Amistad* was the scene of a famous slave revolt in the mid-1800s and its recreated version is meant to evoke the overcrowding and other inhumane conditions of the slave trade.

August: Police in Davidson, North Carolina, defended the decision to search a woman's car for drugs after an officer noticed that she had in her car a copy of a newspaper with a photo of a marijuana plant. Nothing unlawful was found.

Miami plaintiff's attorney Stanley Rosenblatt, after persuading a jury to vote a $145 billion punitive damage award against major tobacco companies, told Knight-Ridder that other legal issues so absorbed his attention that he wasn't giving any thought to the possible fees he might recover from the action.

September: The Equal Employment Opportunity Commission ruled that belief in odd scientific notions, such as cold fusion or mysterious messages from UFOs, may be entitled to antidiscrimination protection on the same basis as religious belief.

A judge criticized an Indianapolis law firm for billing heirs $1.5 million for administering the estate of a wealthy businessman who died without a will, a sum that included 900 hours worth of work it says it spent calculating those very fees.

October: Owens Corning, the top maker of home insulation, filed for bankruptcy under the pressure of hundreds of thousands of asbestos lawsuits, most filed by workers with no significant illness. The previous year, 12 Democrats on the House Judiciary Committee, including Reps. John Conyers Jr. (Mich.), Howard Berman (Calif.), Zoe Lofgren (Calif.), Maxine Waters (Calif.), and Tammy Baldwin (Wis.) had signed a report declaring that "there is little likelihood that asbestos liability could lead to bankruptcy" for Owens or other big companies. According to the Democrats, "the principal remaining asbestos defendants are not facing any significant threat of bankruptcy." Among other companies they named as in no danger of going broke was Armstrong World Industries, the largest maker of flooring, which proceeded to seek protection from creditors in December.

Zoning authorities in Snydersville, Pennsylvania, sent a violation notice to father and son farmers Jake and Stuart Klingel because they had carved a maze through their cornfield and opened it to the public for a fee.

November: A three-judge panel ruled that Atlantic City, New Jersey, casinos did not violate the federal racketeering law by reshuffling blackjack decks frequently when they knew or suspected that patrons were counting cards, a memory technique that can improve a customer's odds of beating the house as the number of remaining undealt cards declines. Federal Judge Morton Greenberg ruled that the claims "border on the frivolous" because the New Jersey Casino Control Commission specifically authorizes casinos to reshuffle at will, because the players "can avoid any injury simply by walking away from the alleged wrongdoers, the casinos," and because the loss of the chance to make

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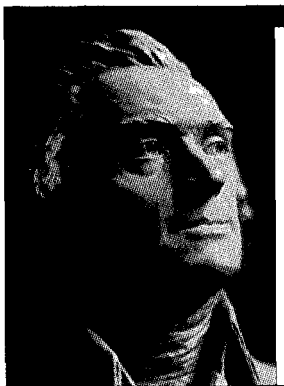

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money at a casino's expense can hardly be characterized as "an injury to business or property."

December: Reversing a lower court, the Mississippi Supreme Court ruled that one Robert Shindler had no grounds to sue the Grand Casino Tunica for extra winnings he said he was due, in the court's words, "for a series of mini-baccarat games he played on August 22, 1997. Shindler claims that although he wanted to bet $20,000 per hand, casino personnel would only let him bet $5,000 at a time."

A federal judge ruled that although Tina Bennett had been "belligerent and displayed an unprofessional attitude" at her job, had "difficulty controlling her emotions" and was "incredibly sensitive to criticism," she was nonetheless entitled to sue arguing that these personality traits were caused by severe depression and should have been accommodated under the ADA by her employer, the Unisys Corp.

In Great Britain, the defense ministry announced that the noise to which soldiers are exposed from military brass bands, and likewise the noise from gunfire during infantry training exercises, was in violation of occupational-safety regulations safeguarding workers' hearing. "One solution would be to provide ear protectors during training, but then soldiers couldn't hear their sergeant major giving orders," said a ministry spokesman.

The chief of Britain's military staff, General Sir Charles Guthrie, assailed as "ill-conceived" a proposal floated by figures within British officialdom that the armed services should be compelled to accept disabled recruits for front-line positions.

Meanwhile, British schoolyards are prohibiting children from engaging in skipping and other quaint pastimes such as the game of "conkers," played by throwing chestnuts at classmates. A survey by Keele University found educators were nervous about being sued, and one headmaster declared that if he had his way he would "ban all playtimes, as they are a nightmare."

Contributing Editor Walter Olson (wo@walterolson.com) is a senior fellow at the Manhattan Institute and edits Overlawyered.com.

Cathy Young

Many Americas

Don't confuse the electoral vote map with the territory.

Whether you think the Electoral College is a silly archaism that frustrates the people's will or a time-tested institution that helps preserve our republic, one thing is certain: That red-and-blue electoral map not only illustrates but dramatically inflates political, cultural, and geographic differences in the United States.

Last November, the oft-reproduced image of a vast sea of Republican red framed by strips of Democratic blue gave rise to much talk about "the two Americas." Partisans at both ends of the political spectrum have long described what they consider the "other" America in clichés that border on nasty caricature. In 2000, the nastiness seems to have escalated—perhaps because, with the election a virtual tie and the results in dispute, there were stronger-than-usual motives to suggest that the other side's votes were less worthy.

The most egregious instance of such vilification was a now-infamous November 13 column posted on MSNBC.com by Democratic strategist Paul Begala. Responding to commentator Mike Barnicle's observation that the red-and-blue map represented a cultural divide of "family values versus a sense of entitlement," Begala proposed a darker way of looking at this split: "You see the state where James Byrd was lynch-dragged behind a pickup truck until his body came apart—it's red. You see the state where Matthew Shepard was crucified on a split-rail fence for the crime of being gay—it's red." He rattled off other awful deeds that occurred in the "red" states, from the Oklahoma City bombing to the teachings of Bob Jones University.

Later, Begala indignantly claimed that his argument was deliberately distorted and that he was trying to show how preposterous generalizations about regional character could be. But that explanation doesn't hold up; at most, Begala's original article allowed that the "red" states couldn't be reduced *entirely* to a hotbed of hate. The former Clinton advisor was articulating a view of flyover country that is hardly uncommon among the liberal intelligentsia. After Al Gore finally conceded the election in December, *Boston Globe* columnist David Nyhan sneered that the "angry white males" who had backed George W. Bush could finally claim victory and "go back to their day jobs—oiling their Smith & Wessons, hectoring pregnant girls scurrying into abortion clinics, jeering at welfare mothers."

Conservative pundits have gleefully lambasted this liberal bigotry. And they have every right to be indignant: It's outrageous to peddle vicious stereotypes about millions of Americans simply because they voted for a candidate you oppose. Conservatives would never stoop to such a thing...right?

Actually, three days before Begala's screed appeared on the MSNBC site, a headline on OpinionJournal.com, the Web spinoff of the *Wall Street Journal* editorial page, referred to the pro-Gore parts of the country as "the Porn Belt." The article, by former Delaware Gov. Pete du Pont, ominously noted that Gore carried the areas in which sex videos make up the highest share of the home video market (the West and the mid-Atlantic states—including, of course, Delaware) and depicted the election primarily as a referendum on traditional morality.

Not to be outdone, *National Review* ran a piece by Mark Steyn titled, "Who Are These People? Gore's America—And Ours." Gore's America, as depicted by Steyn, consists mainly of "Al Sharpton's entourage, gay scoutmasters, partial-birth-abortion fetishists," liberal Hollywood airheads, and foreigners. A "not-insignificant chunk," Steyn speculated, were either non-citizens who had voted illegally or "people who are U.S. citizens but probably shouldn't be," having been rushed through the naturalization process without criminal background checks. Steyn concluded by deriding the bicoastal metropolitan areas as "debauched dystopias that the rest of us can visit for wild weekends every now and again before returning to our homes in solid, enduring, conservative...America."

There, in stark polarity, you have the two camps' view of each other. Liberals are inclined to see conservatives as bigoted, hate-filled rubes; conservatives are inclined to see liberals as immoral, degenerate, and not really American.

This mutual demonization has an impact on policy ideas. The liberals want to transfer more power to Washington and away from those benighted regions. The conservatives' city-bashing translates easily, today as a century ago, into immigrant-bashing. After the election, former *National Review* editor-in-chief John O'Sullivan warned that continued immigration seriously imperiled Republican fortunes in future elections. He was echoed by Richard Brookhiser, who sneered at "daffy" pro-immigration Republicans in his *New York Observer* column.

It's hard to tell which brand of smugness is more obnoxious in its claims to superior virtue. The real question, though, is not which America is morally better but whether there are "two Americas"—a dubious cliché that went virtually unchallenged in post-election commentary.

For one, how people vote for president is a very limited measure of who they are. This is particularly true in a two-party system where the building of often incongruous coalitions is the key to success. Data from the Pew Research Center, which has compiled an extensive taxonomy of the American voter, show that about one in three Republicans are "populists" who like both traditional values and activist government, while about two out of five favor legal abortion and gay rights. Over a third of Democratic voters are generally pro-business and skeptical of government,

while roughly as many are social conservatives. Of course, in Election 2000, both major-party candidates strove mightily to blur ideological differences in pursuit of the coveted center.

One of the peculiarities of the electoral vote map is that it treats each state as a solid bloc. Whether the winning candidate's margin of victory is 30 percent or 0.3 percent doesn't matter: pale pink and light blue are not available. The winner-take-all electoral system may be good politics—though I'm not convinced of that either—but it sure makes for lousy cultural analysis. It doesn't tell us, for instance, that Bush got 43 percent of the vote in California, 40 percent in Maryland, and 38 percent in Connecticut, while Gore got 45 percent of the vote in Louisiana and 43 percent in Georgia and North Carolina.

Not unlike the much-touted gender gap, regional differences in political outlook are large enough to influence the outcome of elections but not to support sweeping statements about a polarized country. These differences are smallest when it comes to taxes, social spending, and the role of government; but even on "lifestyle" issues, they are surprisingly modest.

For instance, the coastal regions are indeed the most staunchly pro-choice; in a *Washington Post*/ABC News poll in September 2000, 60 percent of registered voters in the East and 65 percent of those in the West said that abortion should be legal in all or most cases. But 54 percent of Midwestern voters agreed as well, while Southerners were evenly split. Predictably, Easterners are the most supportive of stricter gun laws. However, in another recent *Washington Post*/ABC News survey, mandatory gun registration was favored by 79 percent of voters in the East, 77 percent in the South, 76 percent in the Midwest, and 66 percent in the West, while a ban on the sale of handguns was opposed by about 60 percent in every region.

This complexity shows up not only in the polls but *at* the polls. In Nevada, which went for Bush, an amendment to the state constitution guaranteeing abortion rights was approved by popular referendum in 1990; two years later, an anti-abortion ballot initiative was defeated in another "red" state, Arizona. In "blue" California, voters have approved initiatives repealing racial preferences and bilingual education.

Even the juxtaposition of liberal urban centers and conservative small-town America turns out to be much too simplistic. (The staff and most of the contributors of *National Review*, for instance, actually live in debauched urban dystopias and visit solid conservative America for an occasional weekend.) While cities with a population of more than half a million are indeed a reliable Democratic base, giving only about a quarter of their votes to Bush, 40 percent of Americans in small towns voted for Gore. Besides, the big city–small town dichotomy leaves out the suburbs, where most Americans actually live and which, in Election 2000, were split right down the middle.

The big city–small town dichotomy leaves out the suburbs, where most Americans actually live and which, in Election 2000, were split right down the middle.

One intriguing trend is that, as David Brooks notes with some alarm in *The Weekly Standard*, the GOP is losing the "new economy" voters in affluent suburbs around the country and in information-age entrepreneurial hubs such as Silicon Valley. Many of these voters probably belong to the group the Pew Center classifies as "New Prosperity Independents": generally well-educated, affluent, not very religious, often plugged into the cyberculture, and inclined to be critical of government. Brooks suggests that, despite their libertarian leanings, these "bourgeois bohemians" are voting Democratic to reassure themselves that they haven't "sold out" and are still faithful to their countercultural ideals. Another possible explanation is that many of them see Republican moral authoritarianism as not just profoundly uncool but hostile to the individual freedom that they consider genuinely crucial to their well-being.

It's not only voting patterns and poll results that subvert stereotypes of the "cultural divide." It would hardly come as a surprise to anyone that the liberal enclaves of East and West are not necessarily havens of racial and cultural tolerance. Paul Begala's catalog of "hate crimes" from states that voted for Bush could be easily matched by a similar list from states that voted for Gore: a shooting spree at a Jewish day-care center in California, a terrorist attack on an abortion clinic in Massachusetts, much racially motivated violence in New York.

By the same token, "real America" is not necessarily a haven of traditional morality: The *New York Times* article Pete du Pont cited as proof that Bush carried the regions with the lowest rates of sex video rentals also revealed that some ultraconservative counties where video store owners can still face obscenity charges for carrying X-rated tapes are among the most active consumers of pay-per-view adult fare on cable and satellite television.

Middle America may not even, alas, be a haven of rugged individualism. Midwestern voters who tell pollsters that they favor small government are in no rush to give up farm subsidies. One little-known irony of political geography is that the more conservative states tend to be among the top feeders at the federal trough. Bush won 25 of the 31 states that get more in subsidies from the federal government than they pay in taxes.

Forget about the "two Americas": There are many more than that. However uneasily they may coexist at times, *e pluribus unum*—"out of many, one"—is not just a motto. The electoral map has only two colors; our national palette has many more. ◆

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Down in the Flood

The Coen brothers' new movie recalls a federal agency with a screwball story of its own.

By Tim Cavanaugh

For fans of bluegrass music and electoral hanky-panky, the Coen brothers' new movie, *O Brother, Where Art Thou?*, offers a hit parade for the ages. The power of demagoguery, the relationship between self-interest and racial bigotry, the idiotic points on which elections turn—all are on glorious display. But the film's most deft maneuver may be its use of the Tennessee Valley Authority as a prime plot mover: *O Brothers'* Depression-era protagonists are racing to recover a treasure buried on property that's about to be flooded by the TVA.

The Tennessee Valley Authority, enshrined in story and song as a triumph for the common people, provided its most generous benefits to those who needed them least.

The theme of fortunes flooded under by the fabled federal energy project has a real historical antecedent in the saga of George Berry, a real estate speculator, U.S. senator from Tennessee, and National Recovery Administration official. In 1932, Berry led a group purchase of mineral and marble leases in the Clinch River valley. When the TVA moved to condemn his properties in 1933, Berry sought damages from the agency.

Arthur Morgan, the TVA's first chairman, suspected that Berry had been aware of the property's probable condemnation when he bought it; he decided that Berry was just trying to rip off the government and that such questionable ethics rendered him beneath negotiation. When his fellow board members sought conciliation with Berry, Morgan criticized them publicly, exacerbating tensions within the TVA and prompting Franklin Roosevelt to remove him as chairman in 1938, less than five years into a nine-year term.

Morgan's opposition to what he considered a federal giveaway to a well-connected government official highlights a generally unacknowledged point about the TVA: This high-minded agency, "built for the people of the United States," charged in its own charter with the economic and social well-being of the area's residents, and enshrined in story and song as a triumph for the common people, provided its most generous benefits to those who needed them least.

No less than the history of warfare, the history of political exchange tends to get written by the victors. In the official TVA story, the authority's dominion was challenged almost exclusively by wealthy utility magnates like Wendell L. Willkie, the one-time president of Commonwealth & Southern Corporation and the feckless challenger of FDR's third-term election bid. In fact, Willkie made out extremely well, selling parts of his failing utility to the TVA for a cool $44.7 million in 1938. Similar fates awaited the other power companies—many of them also dismal performers in the marketplace—that launched legal challenges against the authority.

It was the people without a comfortable spot in the Southern economy—small farmers, hillbillies, marginal figures like *O Brother's* bumbling cracker heroes—who gave up the most to the TVA and received the least in return. *TVA: The First Twenty Years* (1956), an official history written by agency staffers, describes the massive dislocations that accompanied the TVA's growth with euphemisms worthy of the Pentagon: "Since the owner knows he has to relocate in most cases, early payment makes him more willing to sell voluntarily."

Over 14,000 families who needed "readjustment" were given the boot from their homes. (In the agency's telling, these displaced souls were filled only with gratitude.) The happy peasants who in Jean Thomas' folksy "TVA Song" come pouring in "from Clinch and Holston/and many a family farm" may not have been outraged when the government kicked them out of their homes. But somebody must have been.

It is Hollywood that has most effectively told the other side of the story. Before the Coen brothers, Elia Kazan's *Wild River* (1960) detailed the war of nerves between a young TVA official and an elderly woman who refuses to sell her property. Kazan, the earnest social realist and House Un-American Activities Committee songbird, resolved the argument in favor of the benevolent government, but not before the sticky debate between individual rights and presumed collective benefit had been given an extensive hearing.

It's a debate worth reconsidering today. Nobody is suggesting that California's energy crisis would be solved by flooding Bakersfield or Hollister (as tempting as the thought may be). But the situation, like the one that prompted the TVA's creation, has been widely, if inaccurately, described as a failure of the free market.

Not surprisingly, the notion of letting the state government, or even the U.S. government, take control of California's failing power companies is gaining popularity. Before we head down that path, it's worth remembering that while government often promises to restrain the rich, its first instinct is usually to soak the poor. ◆

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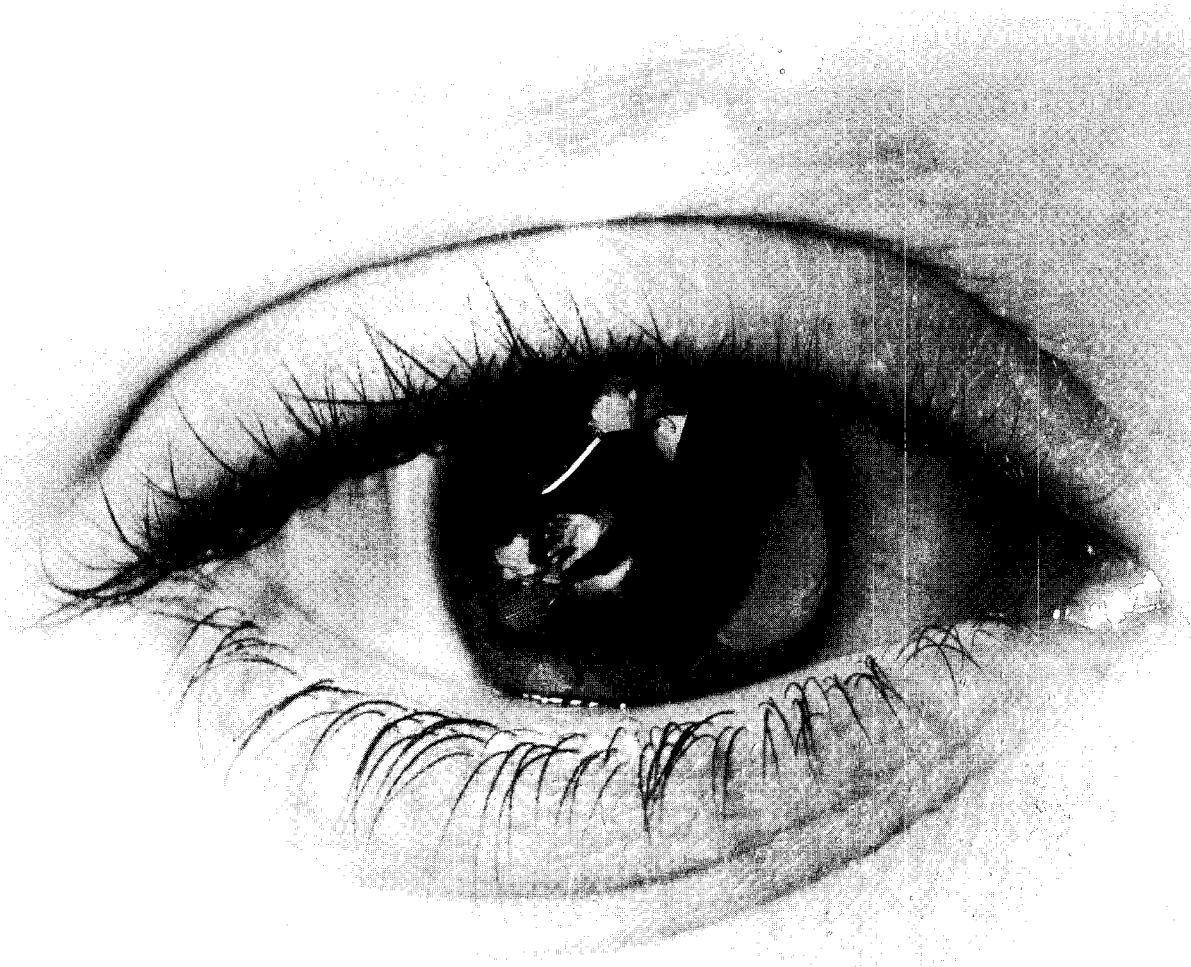


The Whipping Boy

The hidden conflicts underlying the campaign against violent TV

By Jib Fowles

Although television violence has never been shown to cause hostile behavior, its sinister reputation lives on. This is because the issue masks a variety of other struggles. Many of these conflicts are suppressed because they may pose a threat to social order or are considered unseemly topics for public discussion. Hence, we hear only the polite versions of the conflicts between races, genders, and generations, although these struggles roil national life. Because they are denied full expression, such conflicts are transferred into other debates, including and perhaps especially the issue of television violence.

Television violence is a whipping boy, a stand-in for other clashes, real or imagined. As one astute observer put it a few years back during a previous cycle of panic, "The debate about children and media violence is really a debate about other things, many of which have very little to do with the media."

PHOTOS: RON BROWN

There are several reasons why television violence has become such an exemplary whipping boy. First, it is a large target, present in one form or another in virtually every household in America. Second, if one puts on blinders, there might seem to be some correspondence between the mayhem on the television screen and real-life aggression; both televised entertainment and the real world deal in hostilities. (See sidebar.) Third and most important, television violence attracts no champions; the very idea of defending it seems silly to most people. Even industry representatives rarely get beyond conciliatory statements when they are compelled to address the matter. In one survey, 78 percent of entertainment industry executives expressed concern about the content of the action dramas they helped produce. In 1993 Ted Turner, perhaps the most conspicuous industry leader at the time, said in congressional testimony that television was "the single most important factor causing violence in America." The object of derision simply stands still and takes all the abuse that can be heaped on it.

Whatever its immediate source, the energy into the whipping boy of television —fear of disorder that, in th

What are the real conflicts that are being displaced? Most entail the stronger overwhelming the weaker, but in some conflicts the weaker retaliate through moral exertion. Here is a brief examination of the most important conflicts.

High vs. Low

The attack on television violence is, at least in part, an attack by the upper classes and their partisans on popular culture. In this interpretation, which has been broached repeatedly for a quarter-century, the push to reform television is simply the latest manifestation of the struggle between the high and the low, the dominant and the dominated.

The United States is often regarded as a virtually classless society. Indeed, the overwhelming majority of Americans identify themselves as members of a "middle" class. Everyday experience, however, points in a different direction. Americans constantly make class judgments about one another. They quickly note outward appearances and speech patterns. When necessary, one person learns about the other's occupation and education, where he lives and what car he drives, and locates that person socially. Notions of class rank notoriously crop up in courtship and marriage. Characters in films and television programs radiate class information about themselves to audience members who know precisely how to read such clues.

Perhaps the preeminent living theorist and researcher into matters of class and culture is Pierre Bourdieu. He is best known for his work on the segmentation of society according to preferences in aesthetic taste (for instance, going or not going to art museums). At the center of Bourdieu's work is the concept of *habitus*, an idea similar to that of the English word, *habit*. Habitus is the system of predispositions ingrained in a particular group or social class. It manifests itself in similar thoughts, behaviors, expressions, and leisure pursuits. The shared habitus unites and defines the social entity. Habitus, however, does not shackle individuals; in Bourdieu's scheme, there is ample room for idiosyncratic action.

Another concept special to Bourdieu is *capital*, approximately equivalent to social power. In addition to conventional economic wealth, there are several other kinds of capital in Bourdieu's system. Cultural capital (preferences gained primarily through education), symbolic capital (prestige and honors), and social capital (whom one knows) work together with financial capital to define a person's location in the overall social structure. Social action then becomes a function of class habitus and personal capitals. A final term from Bourdieu's work is *reproduction*, which is the manner by which social classes reproduce themselves and, in doing so, preserve status differences. For Bourdieu, the reproduction of habi-

tus is the key work of a social class.

Although Bourdieu does not discuss television in his magisterial work, *Distinctions* (1984), it does not take much imagination to extend his analysis. He writes in his opening pages that taste (cultural capital) functions as a marker of social class; therefore, different preferences (such as watching television violence or not) can be used to situate a person hierarchically. According to this system, an attack on the most popular medium, on television and especially its violent content, would also be an attack by the dominant class on the habitus of the dominated. To reconfirm social distinctions and maintain exclusivity, members of the dominant class need only profess an opposition to television violence. (Ironically, Bourdieu, mustering all the trappings of a French intellectual, himself attacked television in a series of lectures published in English in 1998, calling the medium "a threat to political life and to democracy itself.")

In the derisive vocabulary of this dominant class, violent content is delivered via the "mass media." This term is used so much that it seems unremarkable, but repetition has concealed its derogatory nature. Programming is not received by an undifferentiated horde; it is received by individuals. In fact, there is no mass, there are no masses. As the cultural critic Raymond Williams wrote in 1958, "The masses are always the others, whom we don't know, and can't know....Masses are other people. There are in fact no masses; there are only ways of seeing people as masses." When dominant Americans chastise the nonexistent phenomena of the "masses" and their "mass medium" of television, with its evil content, what they are really endeavoring is to disparage and suppress the culture of dominated Americans.

The class nature of this conflict is evident in the string of congressional hearings that have addressed television violence. Consider the five such congressional hearings held between 1988 and 1995. Of the 36 non-industry witnesses who testified against television violence, only seven were women. None was black or Hispanic. The 29 white males were identified as presidents, professors, directors, representatives, senators, senior scientists, and other distinguished titles that suggested they were well advanced in their careers. It is this patrician sector of society that for reasons of its own leads the attack on rowdy television violence.

The means by which one enters into society's dominant segment, and in doing so learns to affect reproachful views on television violence, is the academy. The general veneration that greets the academy is a sign of its near-sacred station and of the importance of its role in, as Bourdieu would view it, the reproduction of the dominant class and its habitus. Although the rewards of academics are middling in terms of financial capital, the cultural capital they accrue cannot be surpassed. To have a college degree—only about one-quarter of American adults do—is to have the credential of the dominant; not to have a college degree is to remain forever among the dominated.

:hat breathes life

'iolence has its ultimate origins in fear

:xtreme, could overturn society.

Academics strive to regard television with condescension or an affected indifference. "A studied, conspicuous ignorance about television," communication professor Ellen Seiter wrote in 1996, "is a mark of distinction (like all distinctions, it is valued because it is so difficult to maintain)." Professors' general attitude toward television becomes more pointed when the topic of television violence is discussed; they are quick to assert piously that television is dangerously violent. Among college communication teachers, two-thirds of a 1991 sample of 486 instructors agreed that television "increased aggressive behavior." Of 68 scholars who had published papers or reports specifically on television's effects, 80 percent concurred that

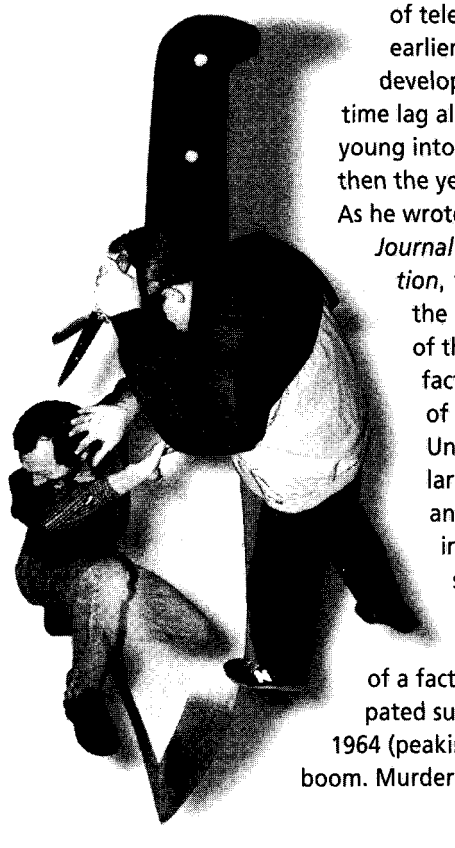
Missing Link

The bum rap against TV violence

If there were a causal connection between watching symbolic televised scrapes and the menacing aggression lurking in the real world, then this relationship would surely be reflected in national crime trends.

One could expect that, as television violence proliferated, rates of violent crime would also increase. It does appear that television violence has been slowly growing in volume and intensity since 1950. Even if the networks have been televising fewer bloodbaths in recent years, as some observers claim, there is still more violence available overall because of the expanding number of channels. Moreover, each annual contribution to the mountain of violent offerings may well have had a cumulative effect. We should logically expect a steady increase in national violent crime data during the television era. Conversely, a drop in violent crime rates would cast doubt on any linkage between television violence and antisocial behavior.

Striking testimony to the TV violence–crime wave connection has been offered by psychiatrist Brandon Centerwall. In a 1989 paper, Centerwall examined the increasing incidence of homicide in the United States during the 1960s and early '70s, noting that the trend paralleled the diffusion of television sets approximately 15 years earlier. He then argued that the earlier development caused the latter, with the time lag allowing for the indoctrination of the young into the ways of video slaughter and then the years for them to mature into killers. As he wrote in a 1992 paper published in *The Journal of the American Medical Association*, "The introduction of television in the 1950s caused a subsequent doubling of the homicide rate, i.e., is a causal factor behind approximately one half of the homicides committed in the United States." Centerwall cited similar trends for television-ridden Canada and the lack of such high crime rates in South Africa, which had no television until 1975.



But Centerwall's intriguing data are more readily explained in terms of a factor he chooses to slight: the unanticipated surge in births between 1947 and 1964 (peaking in 1957) known as the baby boom. Murders are disproportionately the handiwork of young males, and throngs of them were maturing in the 1970s, producing unusually high homicide rates. It was shrewd of Centerwall to select Canada as his other test case because Canada and the United States were among the very few countries to experience a postwar bulge in birth rates. South Africa, with its low pre-1975 murder rates, did lack television, but more significantly it lacked a baby boom.

When America's violent crime statistics are extended beyond Centerwall's cutoff date of 1975 and beyond the dates of his publications, the weakness of his causal argument becomes clear. Violent crime in the 1980s remained high, but as the baby boom cohort members aged past their 30th birthdays in the 1990s crime began to decline. FBI statistics show that from 1991 onward the violent crime rates have decreased each year. Moreover, rates for property crimes have been decreasing since 1980. Thus, as more entertainment violence has become available on television, crime rates in the United States have been decreasing.

In any case, television is not a schoolhouse for criminal behavior because, as a rule, televised amusement is not a very good teacher. Viewers turn to entertainment for relief, not instruction. They usually want to get material out of their minds rather than put things into them.

It's not difficult to demonstrate the medium's uninstructive nature. Studies have looked for—but failed to find—evidence that TV watching influences viewers' attitudes or behavior in a range of areas. In terms of violence, for example, there is no demonstrable statistical relationship between a viewer's favorite aggressive television hero—the one with whom the viewer is most likely to identify—and any imitated attitudes or behaviors, according to research by British researchers Dennis Howitt and Guy Cumberbatch. And as University of Toronto psychologist Jonathan Freedman recently told REASON, both the number of published studies purporting to link TV viewing to aggressive behavior and their highly arguable conclusions are routinely exaggerated. (See "Phantom Studies," Citings, December 2000.)

As liberal media critic Todd Gitlin has written, "Violence on the screens, however loathsome, does not make a significant contribution to violence on the streets. Images don't spill blood."

—Jib Fowles

television violence produced aggressiveness.

Professors researching television's effects, therefore, seem to occupy a doubly honored position. Not only are they, like their colleagues, performing the crucial service of reproducing the dominant classes, but they also are breathing life into a key issue in the struggle between the dominant and the dominated. They may devote their entire careers to demonstrating the dangers of television violence and are bound to receive approbation from the dominant class as a result. No wonder the position of television effects researcher has proven so attractive.

Yet when a given skirmish over violence has exhausted itself and a lull sets in, members of the dominant class revert to their un-self-conscious viewing of televised mayhem. Even college professors watch TV. During one lull in the violence debate, a 1982 study found that media professors did not restrict their children's viewing any more than the rest of the population did.

Us vs. Them

Perhaps the most striking conflict concealed in the debate over television violence involves the fabrication and control of "the Other." The best-known treatment of the concept of the Other is Edward Said's *Orientalism* (1978). The Orient, argued Said, was one of Europe's "deepest and most recurring images of the Other." It was "almost a European invention" that served as "a Western style for dominating, restructuring, and having authority over the Orient." Superiority over the Other was one motive for this phenomenon; another was self-definition. "The Orient," Said wrote, "has helped to define Europe (or the West) as its contrasting image, idea, personality, experience."

Thus the Other, the "not-us," is a fabrication used both to regulate those classified as the Other and to distinguish the culture of those doing the classifying. It is also a mechanism for emphasizing differences and disregarding similarities in order to maintain group solidarity. The Other differs conceptually from the mass in that the mass can be a part of "us," even if a discredited part, whereas the Other remains outside.

In the United States, the Other is often primarily a Dark Other—blacks and, to a lesser extent, Hispanics. The Dark Other is the recipient of an undeniable assault that plays out in racially charged terms. One form of the assault on the Dark Other is the War on Drugs. This "war" promotes definitions of legal and illegal drugs that have favored whites at the expense of the Dark Other; alcohol and prescription tranquilizers (both of whose records of extensive abuse and human damage are well documented) enjoy legal protection, whereas drugs associated with black culture, such as marijuana and cocaine (the health effects of which, on examination of the data, appear to be negligible), are proscribed. Of course, there is nothing inherent in these drugs that allocates them to the legal or illegal categories. These allocations are socially determined.

The anti–television violence crusades are part of this same assault. People do not worry about their own viewing of violent shows, and in fact they are so at peace with it that they are less likely to acknowledge the violence at all. They worry extensively, however, about what the Dark Other is watching. As British media scholar David Buckingham noted in 1997, "Debates about the negative effects of the media are almost always debates about other people."

"People like us" project a scenario onto the Dark Other in which viewing entertainment violence leads to real-life criminal behavior. This scenario is false in every detail—there exists no uniform Dark Other, and symbolic violence does not produce aggression—but it is upheld due to the emotional conviction behind it and the handy availability of rationalizing "scientific proof." Fears of the Dark Other—fears of difference, of being preyed on, of having one's culture overturned, of invalidating one's identity—are denied expression elsewhere but are allowed to sneak into the attack on television violence. In this way, the Dark Other, his culture, his viewing habits, and his behaviors are disparaged.

There is a curious twist to all this, however—a complexity revealing much about the intricacies of social life. Whereas whites push off the Dark Other with vigor, at the same time they subtly beckon him back. Cultural theorists Peter Stallybrass and Allon White observe that whatever is excluded and displaced to the Other then becomes an object of fascination and is summoned back. The desire for cultural homogeneity produces instead a heterogeneous mix. Thus whites are fascinated by the music, dance, clothing styles, and behavior of blacks. Whites study black athletes, seeking to learn about the prowess of the Other. Whites welcome black entertainers, even when (or especially when) black actors are involved in violent scenarios.

Old vs. Young

Adults who enlist in the anti-television crusade always insist that it is "impressionable youths" whom they wish to protect. In the guise of shielding youths, however, adults are trying to contain and control them.

This generational conflict emerges in contempo-

rary polls: A 1997 survey by Steve Farkas and Jean Johnson of 2,000 randomly selected American adults found them ill disposed toward both younger children and adolescents. The majority of respondents used harsh terms to characterize 5-to-12-year olds, such as "lacking discipline," "rude," and "spoiled." Two-thirds of the respondents were very critical of teenagers, calling them "irresponsible" and "wild." According to the report, "Most Americans look at today's teenagers with misgiving and trepidation, viewing them as undisciplined, disrespectful, and unfriendly." Six hundred teenagers were also surveyed, however; they viewed things differently. Most felt happy in their lives and in their relationships with adults. These discrepant attitudes indicate much about the essential nature of generational strife—of who deprecates whom.

Antagonism toward the young can be especially strong in an adult population configured like that of the United States—one that is aging rapidly due to the baby boom phenomenon. As subculture researcher Dick Hebdige observes, in the consciousness of adult society, "Youth is present only when its presence is a problem, or is regarded as a problem." Overall, adults feel threatened by the next generation.

Social scientist Charles Acland has argued that "youth's complex relationship with popular culture as a lived and expressive domain is menacing because the uses of culture cannot be policed completely." With adults able only partially to supervise the "menace" of popular culture, children and adolescents turn to their television shows, their movies, their computer games, and their music as an escape from adult restraint. Passing through a difficult stage in life, indeed perhaps the most strenuous one of all, youths turn to television violence for the vicarious release it can offer.

The consumption of symbolic violent content correlates negatively with age. According to a 1993 study commissioned by the Times Mirror Center for People and the Press, age is the single most significant factor in the viewing of television violence: Younger viewers watch much more than do older viewers. Cultural critic James Twitchell suggests that "if you study the eager consumers of vulgarities, you will soon see that this audience is characterized not so much by class (as we tend to assume, due in part to Marxist interpretations of the culture industry) as by maturity."

Youths do not think it probable that there could be any transfer from television's violence to aggression in the real world; of all age groups, they are the least likely to believe there is a connection. Elizabeth Kolbert, a *New York Times* reporter, interviewed three teenage felons on the subject in 1994 and noted, "The three teenagers...all scoffed at the notion that what young people see on the screen bore any relation to the crimes they committed."

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Weaker vs. Stronger

There are at least two cases where the anti-television crusade allows a weaker group to mount an attack against a stronger target. The first relates to the struggle between masculinity and femininity. As the male expresses dominion and the female resists it, everything in culture becomes gendered, or has reference to gender. This pervasive rivalry would be expected to find its way into the anti-television campaign as another camouflaged conflict between the dominant and the dominated, but in this instance the thrust is completely reversed. That is, when the struggle between genders enters into the debate over television violence, it does so as an act of resistance by the female against the male—as a small counterstrike.

The power of males is most pointedly realized in the violence some of them direct toward women.

Alert to the chance of male animosity, women are prone to feeling wary of violence even in its flattened, symbolic form on the television screen. The figment may draw too close to the real thing, whether experienced or imagined, to permit the degree of unimpeded pleasure that male viewers might enjoy. In surveys females are more likely than males to report there is "too much violence in television entertainment" and have been so since the general question was first asked in 1972. When queried about the amount of violence on specific action programs, women viewers will perceive more of it than will men, presumably because of their awareness of and uneasiness about the vicious content.

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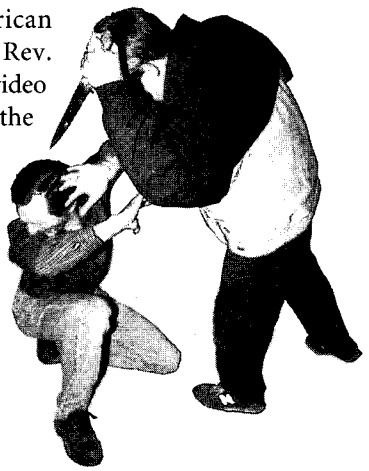
The recurring moral crusade against television violence affords women a choice opportunity for retribution. Seemingly untainted by any overt hostility on its own part, the movement to purify televised entertainment, one that all agree is to be rhetorical only, seems to be shielded from any possibility of retaliatory strikes. How much contention against males is bound up in the 1994 assertion of Barbara Hattemer, president of the National Family Foundation, that "as media violence is absorbed into a person's thoughts, it activates related aggressive ideas and emotions that eventually lead to aggressive behavior"? How much gender strife is exposed in the hyperbolic 1996 statement of Carole Lieberman, chairperson of the National Coalition Against Television, that "more lives are damaged or destroyed by the effects of on-screen violence than by any other medical problem"? She has forgotten heart disease, cancer, and other maladies, and she has done so for a particular reason.

The second case of a counterstrike against a stronger group involves religion. Many of the groups organized in opposition to television violence have religious ties. Here, neither the contestants nor their motives are camouflaged. The partisans on the attacking side are explicit and vociferous; they stand for religiosity, conservative beliefs, and "family values," and they are against licentiousness, media excesses, and symbolic violence. Those under attack—the entertainment industries and, by extension, all sorts of permissive people—respond first with incomprehension and then with annoyance, wishing the conservative and fundamentalist contingent would disappear. It would be easy for the political left to ignore the religious right if the latter did not comprise a well-defined and adamant voting bloc.

This cultural axis could hardly be more different from class antagonism. Social classes are stacked from bottom to top. Here, the axis and its poles can be understood as horizontal, stretching from the most conservative to the most free-thinking. Those gathered at the conservative and evangelical pole come from a wide range of social strata, although they are frequently depicted by their opponents as occupying lower-status positions exclusively. Seeking certainty in the literal word of the Bible, often believing in creationism and patriarchal traditions, and adhering to longstanding customs and attitudes, those clustered at this pole are often moved to take issue with the novelties of social transitions and the uncertainties of modern life.

Fundamentalists rail against the expanding, heaving tableau of television violence, and in organized fashion they strike out against it. The American Family Association (AFA), headed by the Rev. Donald Wildmon, has objected strenuously to video carnage. In 1993 Randall Murphree, editor of the association's *AFA Journal*, wrote: "Violence on the small screen continues to invade America's homes as television offers more graphic murders, bloodier assaults, and general mayhem. And all the while, the dramatic effects on society grow more and more alarming." In 1997 the AFA announced that, by its count, violent incidents in



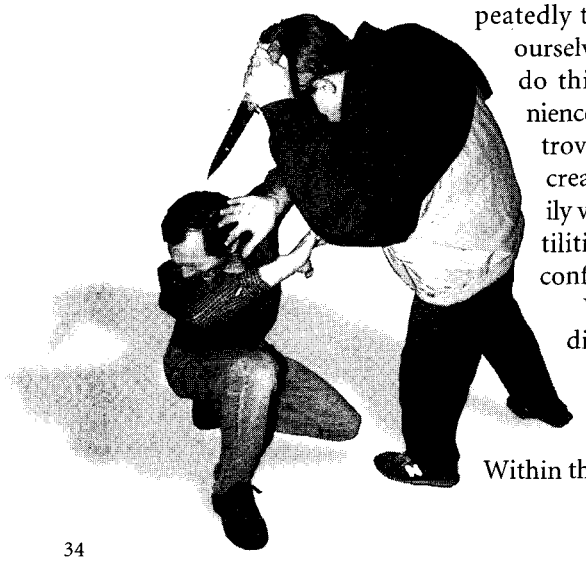
prime time network programs had increased 31 percent from the previous year—an increase far in excess of those measured by other monitors. As an example of the AFA's activities, in August 1997 its "Action Alert" roused its members to contact CBS and "express your concerns about their dangerous agenda of expanding the limits of violence on television through [the cop drama] *Brooklyn South.*"

The issue of television violence affords groups such as the AFA the sanctioned opportunity to carry out a cultural attack—to have at their opponents, to condemn immoral depictions and the entertainment industry that produces and distributes them. Doing so, fundamentalism affirms its presence to others through an issue that is allowed to capture media attention and affirms its role to itself as a guardian of traditional mores. Television violence allows conservative forces the opportunity to carry their standard forward.

As religious conservatives react negatively to social changes of greater and lesser profundity, they may be performing an important service for American civilization. American culture is venturing into areas rarely if ever visited before, and never on such a large scale (for example, in matters of widespread individuality or of social inclusiveness). Some sort of conservative movement may prove useful, much like a sea anchor during turbulence, for steadying the vessel of culture.

The Big Lie

The widely held belief that television fantasy violence stimulates aggression in the real world and should be censured is what propaganda experts might call "a big lie"—a grotesque fabrication to which all unreflectingly subscribe. What makes this particular big lie different from the propagandists' is that it is not bestowed on an acquiescent population by some cabal; rather, this is one that we all repeatedly tell one another, duping ourselves as we dupe others. We do this for reasons of convenience: By repeating this uncontroverted big lie with ever-increasing volume, we can easily vent some of our own hostilities regarding other, truly confounding social conflicts.



While censure is generally directed by the stronger party toward the weaker, in some instances it flows in the opposite direction. Within the gender wars, and in the *invectives of the religious right*, condemnations are directed by weaker parties toward stronger targets. But whether the chastising energy flows from the stronger toward the weaker or from the weaker toward the stronger has nothing to do with the actualities of television violence.

Whatever its immediate source, the energy that breathes life into the whipping boy of television violence has its ultimate origins in fear—fear of disorder that, in the extreme, could overturn society. As Charles Acland has written, "A society is always concerned with normalization, with the organization of its order, to assure the continuation of its structures and distribution of power." Although social order is a perpetual preoccupation, at this point in history it would seem to be an obsessive one; witness the outsized emphasis on the containment of crime at a time when crime is on the decline and the reckless hysteria of the War on Drugs. Sociologist Graham Murdock refers to the "fear about the precarious balance between anarchy and order in the modern age." Exactly why this fearful fixation on social order should be occurring now is open to question. Its existence, however, should not be doubted. Indeed, the need to strengthen social controls has a correlate in Americans' increasing imposition of self-controls: Per capita alcohol consumption and cigarette smoking have been on the decline and health club memberships on the rise for most of the past 30 years.

Television is new enough that it is not embraced without reservations, and it has not yet accumulated the social equity that would allow it to be shielded by nostalgia. In addition to its relative novelty, it is enormous, filling up the day (television viewing trails only work and sleep in terms of expended time), and can be menacing on this count. Because everyone has access to television, its use cannot be regulated, and thus for those who want to control it, the medium is believed to be out of control and threatening. The rise of television, observes media scholar Richard Sparks, "has been taken to signify the drift of history beyond willed control or direction. The censure of television bears witness to the fear of the future."

General apprehension about the course of history is in several senses the opposite of video violence —the passivity of fear vs. the frenzy of aggression, the amorphous vs. the detailed, and the actual vs. the symbolic. The two find each other as if magnetized, whereupon the flaying of the whipping boy begins.

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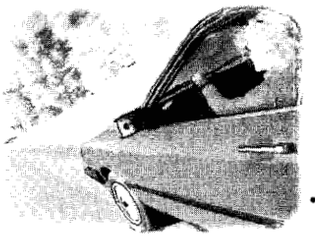

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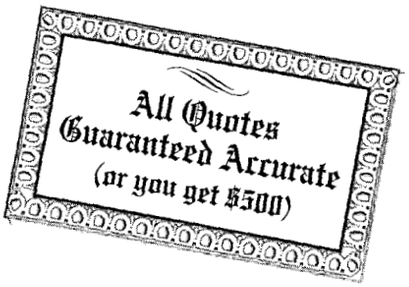

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Intolerant Alliance

Censors of right and left have been cooperating for years.

By Jesse Walker

Punditry rests on a foundation of easy stereotypes, clichés that make it easier to fit one's ideas into a short op-ed or even shorter soundbite. So when social conservatives and liberal social engineers team up against speech that both find distasteful—be it pornography, *South Park*, or video games—the combination is inevitably labeled an "unusual alliance," even if those allegedly unusual allies have been snuggling for years.

The conventional wisdom has it that American censors have always been right-wing, at least in the days before political correctness. It might come as a surprise, then, that the '50s crusade against comic books was led by a leftist psychologist, that Hollywood's old Production Code was a byproduct of the New Deal, and that Jane Addams, one of the Progressive Era's most prominent reformers, worried publicly about the effect movies might have on the young. "Is it not astounding," the fabled founder of Hull House wrote in 1917, "that a city allows thousands of its youth to fill their impressionable minds with these absurdities which certainly will become the foundation of their working moral codes and the data from which they will judge the properties of life?"

Conservatives and progressives have made common cause in many of the moral crusades and moral panics of the last century—and in its broad outlines, one can see the not-quite-unusual alliance taking shape even earlier. The pattern that emerges suggests some interesting things about the authoritarian impulse, and may even offer some lessons for the more libertarian sectors of the left and right.

The pattern that emerges suggests interesting things about the authoritarian impulse, and offers lessons for the more libertarian sectors of the left and right.

Scientific Comstockery

Consider the campaign against dime novels, inexpensive melodramas marketed to working-class readers in the 19th century. Their best-known foe was a man whose name has become synonymous with prudish censorship: Anthony Comstock, Christian fundamentalist and founder of the New York Society for the Suppression of Vice, who devoted his life to suppressing sexual, anti-clerical, and otherwise "immoral" literature. But the books had another set of enemies. As Mark Worth notes in his 1988 study *Children, Culture, and Controversy*, the rise of Comstock coincided with the rise of a different idea, one of "scientific" planning and the rule of experts. "Child-rearing," writes Worth, "which had previously been thought of as being essentially a family matter, attracted the attention of numerous 'professionals,'" including social workers, public health officials, pediatricians, psychologists—and librarians. "Nearly all of these 'professionals' felt that because of their special training, they were better qualified than many parents to make certain child-rearing decisions."

Many of these scientific advances were real. There is a considerable difference, however, between giving people advice and making their decisions for them, a distinction the emerging Progressive ideology tended to obscure. And there is a difference between, say, public health, which involves a fair amount of testable scientific data, and running a library, which does not. Nonetheless, the new generation of librarians were armed with both the presumptions of expertise and the prejudices of their social class, a combination that led some of them to a position much like Comstockery. Such bibliocrats removed dime novels and other "corrupting" literature—a category some extended to include the works of Mark Twain—from their shelves, and they urged their colleagues to do the same.

Their concerns and Comstock's didn't entirely overlap: The librarians worried that "bad" books would spoil children's taste for better literature, while Comstock believed the texts were literally inspired by the devil. But both sides argued that the books contributed to juvenile delinquency—that by depicting crime at all, even in a negative light, they glamorized it, thereby recruiting kids into the underworld. Comstock's crusade was theocratic; the librarians claimed the mantle of science. Yet they arrived at the same place.

Coding the Movies

Obviously, one can be a member of the professional class without also embracing the political

left. But by the end of the Progressive Era, the intersection between the two groups had grown large. *Reform* now referred not just to citizens trying to remake social institutions, but to social institutions trying to remake citizens; the language of liberalism and the terms of technocracy had merged into a hopeless muddle.

On March 31, 1930, the Motion Picture Producers and Distributors of America adopted the Production Code, ushering in what is paradoxically known as the Pre-Code Era. Pledged in theory to avoid alluring images of sin, crime, and vulgarity, filmmakers were effectively free to ignore the Code in practice. Local Comstocks could and did censor movies on the state and municipal levels, but Hollywood itself had no uniform mechanism for blocking violent, sexual, or anti-authoritarian pictures.

The Pre-Code Era ended on July 2, 1934, when the studios created a Production Code Administration with the power to enforce the rules. Under its reign, sexual seduction was "never the proper subject for a comedy." Directors couldn't depict the drug trade, because "the existence of the trade should not be brought to the attention of audiences." There could be no profanity, a category which "includes the words, God, Lord, Jesus Christ—unless used reverently." Films could not be disrespectful toward the flag, and no picture could "throw ridicule on any religious faith." And miscegenation was verboten. The rules would evolve over the years, but the system itself didn't begin to crack until the '50s, and was not overturned until the Motion Picture Association of America ratings replaced it in 1968.

Where did the Production Code Administration come from? The familiar historical account stresses the role of the National Legion of Decency and the Catholic Church, traditional conservatives opposed to cinematic sin. But Thomas Doherty's excellent *Pre-Code Hollywood* (1999) notes that the new censorship had two more sources.

One was the Motion Picture Research Council, which conducted a five-year sociological study—financed by the liberal Payne Fund—of movies' effects on the young. In adopting the mantle of science, the Research Council study harkened back to the librarians' crusade against dime novels and *Huck Finn*; it also harkened forward to today's lab studies purporting to show the ill effects of pornography or violent TV. Writes Doherty: "Couched in the jargon of white-coated researchers who had monitored sleeping children with a device called the 'hypnograph' (a 'sleep recorder' placed under the mattress to measure nocturnal jitters after exposure to horror movies) and ladled throughout with statistical precision...the Payne Fund studies seemed to quantify what the matrons and clerics knew in their hearts. To editorial writers and city councilors for whom Catholic theology was but hearsay evidence, the authority of social science clinched the case."

The studios also had to contend with the National Recovery Administration, the New Deal's super-cartel, which would eventually be ruled unconstitutional in 1935. The NRA had its own code for the picture industry, one concerned mostly with business practices but with rules for content as well—and if the latter regulations were vaguer than the Production Code's, that only increased the uncertainty under which filmmakers had to work. (In those days, the courts held that First Amendment protections did not apply to the movies.) Among the NRA's Hollywood administrators was A. Lawrence Lowell, president of the hypnograph-wielding Motion Picture Research Council. Meanwhile, several bipartisan censorship bills were pending in Congress.

It was these threats of government regulation that prompted the studios to give their Production Code Administration some teeth. The new authority was private, not public, but there's little doubt as to whether it would have been created if the feds hadn't been likely to impose even stricter rules from without. And who sat atop the PCA, ruling which film scenes could or could not be released? Joseph I. Breen, a prominent Catholic conservative. Left met right, and censorship was assured.

Comic Tragedy

The Motion Picture Code crippled a young art, but it didn't destroy it. Many movies were wrecked by Breen's bowdlerizations, but others were inadvertently improved: By forcing writers, actors, and directors to sneak in their more subversive images and ideas, the new boundaries fostered a certain measure of subtlety. This hardly justifies its existence, but at least it offers a silver lining. It's harder to make such claims for the Comics Code, imposed in 1954.

Like dime novels, comic books faced attacks from both professional librarians and religious conservatives, with the former claiming that comics discouraged children from "real" reading and the latter adding that the medium led kids to crime and vice. The librarians weren't the only professional group weighing in on the issue: The National Education Association endorsed anti-comics legislation in 1948, along with laws against offensive films and radio shows. At the same time,

the National Office of Decent Literature, a conservative Catholic group, kept lists of comics it considered "objectionable." In theory, the lists were merely an advisory gesture, not a call for legal repression. In fact, as Amy Kiste Nyberg notes in *Seal of Approval,* her 1998 history of the Comics Code, several police forces used the lists "to clear newsstands of objectionable material, even if such material was not found to be obscene under state law. In nearly all cases, a request by the police department did not need to be followed up by legal action."

The chief crusader against comics, though, was Dr. Fredric Wertham, author of the infamous *Seduction of the Innocent* (1954). To the extent that he is remembered today, Wertham has an image as a pathetic prude, obsessively searching superhero stories for sexual influences ("Robin is a handsome ephebic boy, usually shown in his uniform with bare legs....He often stands with his legs spread, the genital region discreetly evident") and recycling Comstockian arguments linking juvenile literature to juvenile delinquency. Yet Wertham was a leftist psychologist, not a conservative fundamentalist: He was strongly influenced by Frankfurt School Marxism and by left-liberal critiques of mass society, and he couched his arguments in secular and scientific terms. And if most of his professional colleagues rejected his perspective, he did find several takers among liberal laypeople, some of whom belonged to the U.S. Senate.

In 1954, the Senate Subcommittee on Juvenile Delinquency held a three-day hearing on comic books, with Wertham as one of its star witnesses. When the subcommittee released its report a year later, it failed (to Wertham's disappointment) to call for federal censorship, suggesting instead that the industry be given a chance to regulate itself. By that time, concerned by the Senate's interest—as well as more direct threats of censorship on the state and local levels—the industry had already formed the Comics Magazine Association of America and adopted a code even more restrictive than the rules faced by filmmakers. Among its provisions:

- "Illicit sex relations are neither to be hinted at nor portrayed."
- "In every instance good shall triumph over evil and the criminal [be] punished for his misdeeds."
- "Although slang and colloquialisms are acceptable, excessive use should be discouraged and wherever possible good grammar shall be employed."
- "Special precautions to avoid references to physical afflictions or deformities shall be taken."
- "All characters shall be depicted in dress reasonably acceptable to society."
- "A sympathetic understanding of the problems of love is not a license for morbid distortion."

There was a little room to maneuver here—the call for "dress reasonably acceptable to society" meant that women had to keep their clothes on, not that superheroes couldn't caper in silly outfits—but there wasn't much. Horror comics almost immediately disappeared, as did the more gruesome crime titles; the satiric *Mad* survived only by transforming itself into a magazine.

Comics are cheaper to produce and distribute than movies, making it easier for outsiders to evade the Code's restrictions. In scarcely more than a decade, a new wave of hippie-oriented underground comics ignored the rules and embraced sex, dope, and, occasionally, genuinely sophisticated themes. With the Supreme Court expanding First Amendment protections, the government did not attempt to impose new regulations (though some undergrounds faced censorship at the local level). In stages, the Code itself was loosened.

But an art form's development had been retarded, a fact one must blame at least partially on the restrictions it had to face. And behind those restrictions stood paternalists of both left and right.

X-Rated Gore

In 1985, Tipper Gore and Susan Baker, spouses of then-Senator Al Gore and then-Treasury Secretary James Baker, founded the Parents' Music Resource Center, a claque of concerned citizens who just happened to be married to some of the most powerful men in the country. The campaign they launched against pop music cast a contradictory set of images.

For general public-relations purposes, they were a grassroots group of parents concerned about the music their children were being exposed to. When it was time to intimidate the music industry, though, they were a well-connected collection of Washington insiders. If someone compared them to the anti-rock hysterics of the past, they stressed their moderation: They were with-it women who loved the rock'n'roll of their youth and would never dream of advocating censorship. But when the talk turned to What Is To Be Done, legal repression always lurked in the background—and sometimes the foreground.

Gore's unintentionally hilarious book *Raising*

PG Kids in an X Rated Society (1987) argues that sound parenting is more effective than government intervention ("Our approach was the direct opposite of censorship"). Then it calls for government intervention anyway—suggesting, for example, that activists "request inquiries into the license renewals of television and radio stations that violate the public interest by broadcasting excessively violent movies and shows."

Above all, the group was simultaneously left and right, ambidextrously adjusting itself to different audiences. Gore pitched herself as a moderate liberal who was adept with sociological evidence and concerned about feminist issues. Yet her book—initially published by Abingdon Press, a religious right outfit—includes an entire chapter on the alleged dangers of the occult, complete with such credibility-impairing factoids as this: "According to Mrs. Pat Pulling, founder of the organization Bothered About Dungeons and Dragons, the game has been linked to nearly fifty teenage suicides and homicides."

Gore's jihad peaked with yet another set of Senate hearings, which provoked yet another set of "voluntary" self-regulations—in this case, the "Parental Advisory" stickers that record companies attach to potentially offensive albums, and which are in themselves enough to get a CD banned from some stores. The PMRC episode has echoes in today's left/right crusades against Goth rock and gangsta rap—and, for that matter, against violent or vulgar movies, TV shows, and video games.

Across the Small Divide

Why have social conservatives and social engineers made common cause so often? In a broad sense, the authoritarian left and authoritarian right will cooperate because both are interested in controlling people. But that doesn't explain why there have been so many times when forces with theoretically opposed goals have embraced the same set of controls.

No answer will be entirely satisfying, if only because the causes themselves emerge in different contexts: What's true about the enemies of dime novels won't necessarily be true about the foes of crime comics. One reasonable theory, though, is that the gulf between "progressive" technocrats and "reactionary" conservatives simply isn't as wide as one might initially assume, even if each side's sense of self requires it to pretend otherwise.

The biggest threat to free speech may not be any particular ideology, but the common impulse lurking behind many superficially opposed points of view.

The utopian future imagined by progressives may differ from the utopian past imagined by conservatives, but a liberal or leftist from a wealthy or middle-class background may be as unable as a rich conservative to identify with the reading, viewing, or listening preferences of the less privileged. Class aside, progressives and conservatives are equally capable of unconsciously adopting the larger social prejudices of their times. Witness Wertham's worries about homoerotic imagery in *Batman*, a fear expressed when bigotry against gays was rarely questioned.

Even when liberals and conservatives prefer different sacred texts—social science in one case, the Bible in the other—they can end up taking similar stances. Both social science and theology are reinterpreted, sometimes radically, from generation to generation, as social mores change. A Christian conservative in 2001 may have more attitudes in common with a secular liberal from the same year than with a Christian conservative of two centuries ago.

One social convention that never seems to disappear is an irrational fear of people different from you, especially if they come from the lower social orders; and with fear, there often comes the desire to remold. The biggest threat to free speech may not be any particular ideology, but the common impulse lurking behind many superficially opposed points of view. ◆

Jesse Walker (jwalker@reason.com) is an associate editor of REASON.

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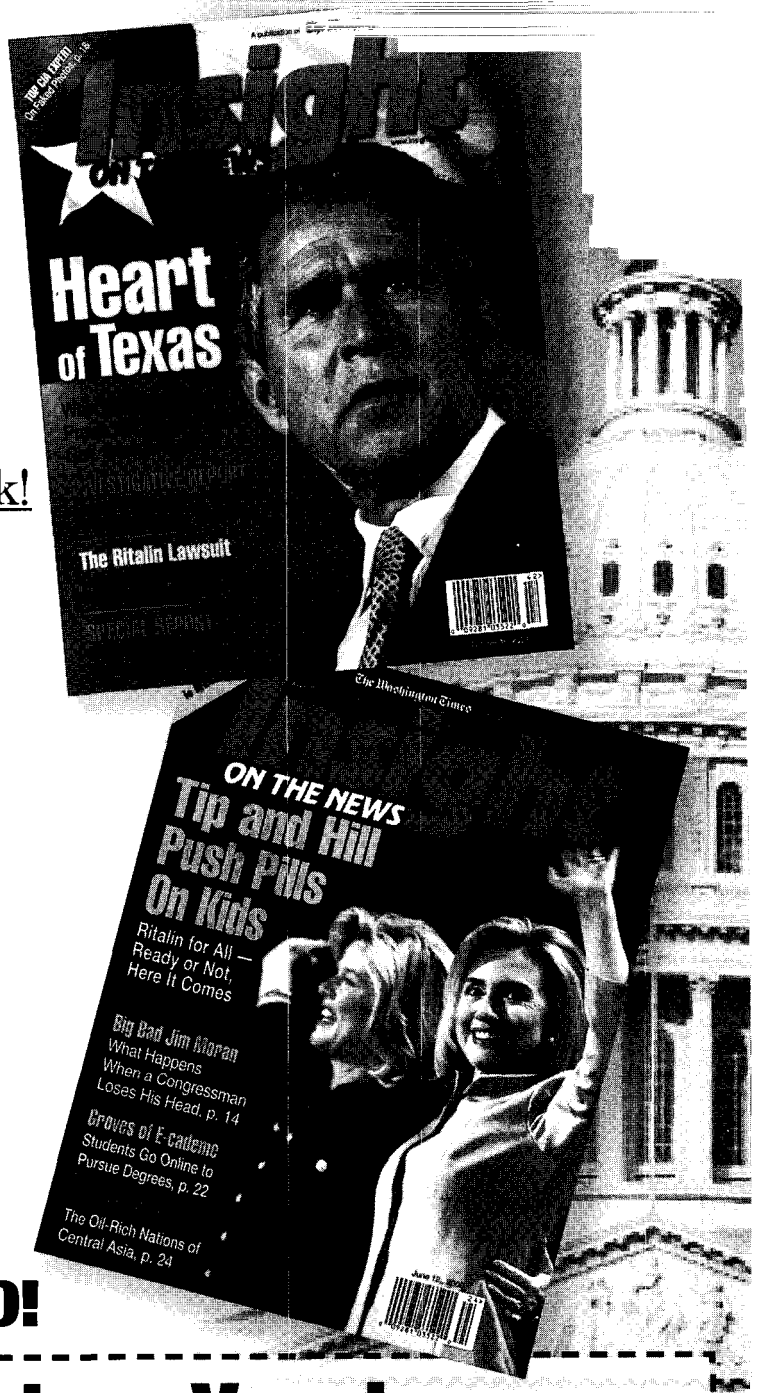
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Stuffing Envelopes

Does recent research prove we're altruists—or does it suggest something darker about us?

This is a story about some economists who set out to study altruism and ended up discovering something very frightening about human nature.

Altruism itself has, at best, a mixed reputation among economists. Adam Smith famously observed that "it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner but from their regard to their self-interest. We address ourselves not to their humanity but to their self-love." In other words, who needs altruism when we've got greed?

In fact, greed can be far more efficient than altruism. An altruistic butcher can't serve his neighbors well unless he knows how many want beef on the table and how many want chicken. How does he get that information? Ordinarily, butchers learn about demand by observing prices: Other things being equal, the higher the demand, the higher the price. But in a world of pure altruism, there would be no prices to observe.

By Steven Landsburg

If you happen to like this article so much that you decide to buy a lifetime subscription to REASON, some Asian farmer has to grow another linseed plant. That's because the ink in this magazine is made from linseed oil. How does the Asian farmer know you need more linseed? Because rising subscription numbers set off a chain reaction: They raise the demand for ink, which raises the price of ink, which raises the demand for linseed, which raises the price of linseed. The farmer knows someone needs more linseed when he sees the price go up. Without prices, he'd have to guess at your preferences and might plant rutabaga instead.

Despite such efficiencies, of course, there are obvious advantages to living in a world where people care about their neighbors, and economists spend a lot of time theorizing about both the prevalence and the consequences of altruism. Enter Vernon Smith. Forty years ago, as a young assistant professor of economics at Purdue University, Smith championed the then-unheard-of notion that economists who theorize about human behavior could learn something useful by actually *observing* some human behavior, preferably in controlled experimental settings. Today, Smith presides over the renowned Economic Science Laboratory at the University of Arizona, where he and his colleagues recently set out to study altruism—and ended up discovering something dark and disturbing about human nature instead.

Here's one of Smith's experiments: Two total strangers are placed in separate rooms. They never meet, they never learn each others' names, and they come and go by separate entrances. One of them is selected randomly to receive 10 one-dollar bills and an envelope. He can put any number of bills in the envelope and send it by messenger to the other subject. Then everyone takes his money and goes home.

Simple economics predicts that no money ever goes in the envelope. And that prediction is borne out about two-thirds of the time. The remainder of the time, the prediction is still not far off. When there's anything in the envelope, it's most often a single dollar bill.

You might interpret this as evidence that most people are very selfish, but that seems like the wrong conclusion. Not even Mother Teresa was in the habit of sending money to total strangers about whom she knew nothing. Every time you check into a hotel, there's a stranger in the next room, but your failure to send him an envelope full of money is hardly an indictment of your charitable instincts. In fact, the more charitable you are, the more likely you are to keep the money so you can give it to someone who is truly needy. Once those dollar bills leave the economics lab, we have no idea how many of them end up in beggars' cups, church collection plates, or United Way envelopes.

Why, then, does any money *ever* get passed to the other room? My guess is that it has nothing to do with altruism or charity and everything to do with the subjects' suspicion that they're being observed—and judged—by the experimenter. As a matter of fact, any such suspicion is ungrounded; elaborate procedures, which are explained at the outset, prevent the experimenter from ever learning who passed which envelope. But who says people can't respond to an ungrounded suspicion?

To test the size of that effect, the researchers performed a similar experiment without the elaborate precautions, so that the experimenter knew exactly who the subjects were and what they did. Sure enough, this changed things considerably; 80 percent of the subjects put something in the envelope, and the average transfer rose from $1.08 to $2.66.

The Cox experiments suggest that we have a redistributive tax system not because people want to help the poor or the unfortunate, but because people enjoy moving other people's money around just to make mischief.

Now we come to the dark and unsettling part. James Cox, one of Smith's colleagues at the University of Arizona, has been running a variant of this experiment where subjects know that everything they put in the envelope will get tripled by the experimenter before it's sent to the other room. If they give up a dollar; the other guy gets three. If they give up 10, he gets 30.

In the Cox experiment, even with elaborate anonymity procedures, subjects gave up a lot more money. In fact, virtually all of the subjects put at least a dollar in the envelope, and instead of $1.08, the average envelope contained $3.63 (so the other guy got $10.89 on average). In other words, subjects give more generously when they can get a bigger bang for their buck.

You might think that's a pretty heartening result. It

looks a lot like altruism—a willingness to make sacrifices as long as the gain to others substantially exceeds the loss to one's self. It's as if the subjects were saying, "I'm willing to give away money as long as I can make the world a richer place in the process."

But that's not what they're saying, and this isn't altruism. Altruism means personally paying for the privilege of enriching a total stranger. That's not what these people are doing at all. Instead, they're paying for the privilege of taking money away from one total stranger—namely the taxpayer who's funding the experiment (through the University of Arizona and the National Science Foundation)—and giving it to another total stranger who happens to be in the next room. There's no sense in which that makes the world a richer place. And the subjects do all this without knowing anything at all about either stranger or having any reason to believe that one is more deserving than the other.

In the words of University of Rochester economist Mark Bils, "That's a pretty ugly instinct. It scares me to think I'm living in the same world with these people." It's not like they're taking from the rich to give to the poor; they're just randomly taking from some people so they can give to others. It's hard to imagine their motive, unless they just plain enjoy the capricious exercise of power, bestowing good fortune on some and bad fortune on others without any need for a rhyme or reason. In a world where people get a kick out of being arbitrary, no property right is ever safe.

Taken at face value, the Cox experiments suggest that the reason we have a redistributive tax system is not because people want to help the poor or the unfortunate or the incapacitated; it's because people enjoy moving other people's money around just to make mischief.

Now you might say: "Wait a minute. These *are* good people. They *are* trying to do the world some good. They're just not conscious of the fact that the money they transfer has to come from somewhere." As Bils points out, that's even scarier. These subjects are mostly university students, and they don't realize that when you give away money, it has to come from somewhere? And we allow these people to vote?

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The Legacy o

Election 2000

George Bush won. But at what cost to the law? Two legal analysts offer differing assessments.

Constitutional litigation will return to normal, but the political battles are just getting started.

By Richard A. Epstein

What is the moral of the Great Florida Recount? Bush supporters, whether devoted or tepid (I fall in the latter category), may be personally relieved that the outcome lined up with their votes. But partisan politics aside, we can learn larger lessons from this classic judicial brawl. One lesson is that tragedies and near tragedies develop one small step at a time. Each side is rightly and mightily distressed with the prior machinations of the other. Each is therefore emboldened to take the next small step. Each step prompts the next until we come to the brink of a constitutional crisis.

That's just what happened starting November 7, 2000. Most pundits thought Al Gore's prompt request for a hand recount in friendly precincts would prolong the election by perhaps another week. They were the same type of folks who in August 1914 thought that British troops would return home from France by Christmas. What the election optimists missed is that both sides of this close conflict deeply believed that they had right on their side.

That is the second lesson of Florida's long count. The prolonged grudge match between George W. Bush and Al Gore offers ample confirmation of the endurance of primal instincts in human affairs. In our over-intellectualized analysis of politics, we place too much emphasis on the word "political" and too little on the word "animal" in the phrase "political animal." Alas, nature's first maxim of survival is to avoid a fair fight when both sides run the risk of serious injury. Nature therefore codes all animals to hold their ground when right, and to slink away when

JODY MAY

wrong. That game plan works pretty well except when each side to a dispute thinks in moral terms and believes it is right. Then a battle royal ensues.

The mutual sense of being wronged intensified the conflict, as did the fact that each side needed to make only the kinds of arguments most congruent with its legal philosophy. Democrats take an expansive view of language and harbor a yen for social justice, while Republicans gravitate toward plain-meaning interpretations and the rigorous application of formal rules. Truth is, this contest would have been over sooner if the litigating position of each side had required it to embrace the legal philosophy congenial to the other. But instead, the striking correlation of their legal strategies to their deepest psychological predispositions goaded both sides to fight harder.

The five conservative justices on the U.S. Supreme Court invoked what can only be described as the broadest equal protection test known to man, for which they have been rightly skewered.

The initial Gore response was an irritated expression of disbelief at the large but confused "butterfly ballot" vote for Pat Buchanan in Palm Beach County. But since Democratic operatives had prepared this ballot (to make the print easier for seniors to read), the Gore people could not lash out at Republican misdeeds, nor rectify the error in court. They did, however, think that the Republicans owed them one on the recount, and thus were emboldened to pressure canvassing board officials in Broward and Miami-Dade counties to run a hand recount that paid ever-greater homage to dimpled chads.

Republicans reciprocated in kind because they had no remorse for having won Florida fair and square, notwithstanding Democratic blunders. They showed their true colors when Florida's Secretary of State Katherine Harris eagerly exercised her discretion to deny the contested counties a waiver of the one-week deadline established for recounts. After all, the initial review of the ballots in Broward and Palm Beach counties resulted in only about 2 percent of the "undervote" being converted into votes. Thereafter, the consistently more lax standards in Broward County converted dimpled chads into 567 net Gore votes. Palm Beach County followed a more erratic but conservative course, which in the end produced, depending on who is believed, between 176 and 215 net Gore votes.

Clearly the choice of standards mattered. To forestall such erratic behavior, what Harris should have done was first to allow more time to complete a recount, but then to insist that manual recounts did not change the standard for a valid vote, which at least required that light go through the hole. Instead she neglected to give any principled defense of her position, which made her vulnerable to attack. In fact, her legal arguments were strong: Florida election law requires an "error in tabulation" to trigger the hand recount, and the machines had worked just fine.

The Florida Supreme Court, however, was now poised to do a bit of high-stepping of its own. The state election law was poorly drafted. Yet it is best read to say that the canvassing boards had to present tallies to the secretary in a week, though leaving her with the power to extend the deadline. The Florida Supreme Court exploited the textual ambiguity to come up with a solution that was inconsistent with any plausible reading of the statute. In a good day's work, that court read "error in tabulation" to allow Gore to challenge the traditional standard for a valid vote. It brushed over the obvious statutory concern with finality in election disputes; it authorized highly subjective hand counts without any safeguards against favoritism and bias; and out of whole cloth it created its own new November 26, 2000, deadline for finishing the hand count.

The Republican faithful on and off the U.S. Supreme Court noted the obvious distortions of the statutory scheme. But they were faced with the same dilemma that had just sapped the legitimacy of the Florida Supreme Court: The higher a case goes in the judicial system, the narrower the grounds for review, and the stronger the arguments needed to sustain a reversal. The Florida Supreme Court did not meet that burden when it overturned the secretary of state, so the conservative five on the U.S. Supreme Court faced the next round of the ongoing realpolitik dilemma: Play the game straight at your level and lose to the machinations of the judges below, or stretch the law a bit at your level, if necessary, so as to undo their error with some judicial innovations of your own. The case had not gone far enough to stop all litigation in Florida cold, so a grumpy but unanimous U.S. Supreme Court asked for the Florida Supreme Court to explain itself—only to set the stage for a bigger fight next time round. Nine troubled justices retained peace without honor, through delay.

Back in Florida, business continued at a brisk pace. The canvassing boards in the key Florida counties all responded differently to the November 26, 2000, deadline. Broward finished its count and came up with a trove of over 500 new Gore votes. Miami-Dade called off its count, and Palm Beach County came within two hours of finishing its own recount. Harris, ever jealous of the prerogatives of her office, rejected the Palm Beach request for delay, and certified the Bush victory. That action promptly moved the case from its protest phase to its contest phase.

This move is larger in legal than popular estimation. A protest

leads to more administrative work, but a contest requires a full-dress trial, complete with fact witnesses and cross-examination. The contest trial was held before Judge N. Sanders Sauls. who, consistent with the first Florida Supreme Court decision, found that the canvassing boards had not abused their discretion in the extended recount phase. He also found, more debatedly perhaps, against the Gore team on the grounds that they failed to meet the probabilistic burden of proof required for a contest.

Normally, a Supreme Court on appellate review is hard pressed to overturn a trial judge who has found in favor of an administrative official. But by a 4-to-3 vote, the Florida top court confounded most people's expectations by deciding, first, that every vote must count when the intention is clear, and second, that a recount of the undercounted votes throughout the state must be conducted under judicial supervision. The new dose of uncertainty could only benefit Al Gore.

This weird equal protection theory should not have ended the case. It cried out for the remand sought by Justices Souter and Breyer so that the Florida Supreme Court could establish a standard of its own.

Once again, the majority of the Florida Supreme Court twisted Florida law by ordering what was in essence a judicial continuation of an administrative recount. But at the contest phase, simply having election officials count ballots doesn't cut it. A trial was required to allow both teams to call local officials to the stand as fact witnesses, subject to cross-examination. That trial also should have allowed the Bush forces to challenge the legality of the undervote recount in Broward, Miami-Dade, and Palm Beach, but the four-member majority simply added those Gore votes as-is to the final tally, without taking any evidence at all from the Bush team. In essence the Florida Supreme Court appointed Judge Terry Lewis as *de facto* secretary of state to complete a recount, but made no provision for it to be challenged thereafter in any full-fledged contest.

So the case went up again to the U.S. Supreme Court. Only now the judicial dilemma was still more acute: If a bare majority of the Florida Supreme Court could have succeeded with its maneuvers, then Al Gore might well have been handed the presidency. In response, the five-member majority of the U.S. Supreme Court played a tough game of tit-for-tat. They stayed the Florida recount under a broad definition of "irreparable injury" to avoid, as Justice Scalia said, casting a "cloud" over the entire election. Justice delayed was, in a sense, justice achieved. The stage was set for a full-scale reargument, where once again the conservative majority had to show not just that the Florida Supreme Court was wrong, but so terribly wrong as to offend some constitutional guarantee.

The fits-and-starts of the Florida recount and contest procedure presented two lines of attack. The five conservative justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) invoked what can only be described as the broadest equal protection test known to man, for which they have been skewered by an enraged liberal press. Doctrinally, these critics have a real point. Normally, it is critical to know just what class of persons is disadvantaged by unequal treatment. That question can be answered with tolerable certainty in the "one-man/one-vote" cases decided in the 1960s. In those cases, residents of urban counties had a tiny say in state governance compared to their country cousins. But in the Gore/Bush bash, it is odd to lump all undercounted voters, whoever they might be, into one protected class, especially since any Bush undervoters were quite happy to see their votes uncounted so long as the Gore undervoters were equally ignored.

Worse still, this weird equal protection theory should not have ended the case. Rather, it cried out for the remand sought by Justices Souter and Breyer so that the Florida Supreme Court could establish a uniform standard of its choosing, and thus throw the election to Gore by declaring all dimples equal and valid. So the majority of the U.S. Supreme Court deftly cut off that possibility by noting that, under Florida law as interpreted by no less than the Florida Supreme Court, the overriding intention of the Florida legislature was to choose a slate of electors before the December 12, 2000, date (after which the slate could be challenged in Congress). The real decision was 5 to 4, not 7 to 2 as some conservatives have claimed.

The conservative core (Rehnquist, Scalia, and Thomas) went one step further by invoking Article II of the Constitution, which governs executive power. That article provides that the electors in each state shall be chosen "in such Manner as the Legislature thereof may direct." Florida's law calls for a popular vote under a complex election code that Florida courts interpret. This novel constitutional claim does not necessarily turn on bad faith conduct by the four Florida judges, but rather it becomes necessary to show at least that their decision deviated so far from the statute as to constitute new law of judicial origin. Take this line, as the conservative core did, and the judicial process ends with Katherine Harris' certification of George Bush.

Can that extreme claim be defended? In a low-stakes contest no one would bother to cast aspersions on the majority of the Florida Supreme Court. In this high-stakes case, aspersion looks well-grounded, if it matters, given how the Florida Supreme Court took over and continued the recount started by the canvassing boards. The Florida court created a new

scheme for judging elections that can be referred back to the original statute solely by fanciful interpretative footwork. But for the U.S. Supreme Court majority, the operative principle may well have been only this: One bad turn deserved another. And thus the 5–4 majority ran out the electoral clock by overriding a 4–3 Florida majority.

For the public, this struggle was no doubt like a football game that went down to the wire but did not make it to overtime. The spectacle is over, and we can all move on. But academics and politicians have longer memories that lead to endless postmortems. Hyperbolic politicians will seize the platform to denounce the outcome. Key black leaders and liberal commentators have already mindlessly denounced *Bush v. Gore* as another *Dred Scott* decision, without acknowledging just how ugly a situation *Dred Scott* created.

This overblown rhetoric will die down with the next political flap. Still, liberal legal academics will linger on to rub conservative faces in the mire of their newfound activism. But they will have a practical objective, which is to give the next open U.S. Supreme Court seat to a political moderate. In the courts, ambitious lawyers will find constitutional meaning in administrative flip-flops until the Supreme Court states that this equal protection dog barked only once; constitutional litigation will quickly return to normal.

What remains is the uneasy aftertaste of this big decision. But ultimately that will prove more congenial to sober minds than would the alternative of an indefinite and prolonged struggle lasting into the next year. Remember that when two animals fight to the death, sometimes both die of their wounds. Here at least the Republic marches on, chastened, weary, and wiser. It was far from pretty. But it could have turned out far uglier than it did.

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The Supreme Court Shot Itself in the Foot While Shooting Down Al Gore

By Mike Godwin

For any constitutionalist, the proper reaction to the U.S. Supreme Court's majority opinion in *Bush v. Gore* is dismay. In dispensing with the Florida high court's efforts to resolve a confusing election-code tangle, derailing the election-contest process in Florida, and sidestepping the constitutionally established mechanisms for deciding disputed elections, the U.S. Supreme Court has done more than exceed the bounds of limited judicial power—it also confirmed the most cynical view of how the nation's top court operates.

At this point, if you suspect that I'm a Gore supporter, you're right. But before you dismiss my complaints as Democratic whining, let me explain that I haven't lost a moment's sleep over the fact that the other guy won. And it bothers me not a whit that the candidate who lost in the popular vote count won in the Electoral College. What's more, I don't even blame Bush or his team for what the Supreme Court did wrong—I'd be first in line to defend the right and prerogative of both the Gore and Bush teams to take their election disputes to state or federal courts.

In order to get a handle on what the Supreme Court did wrong in *Bush v. Gore*, it helps to look at the Florida Supreme Court's decision in *Gore v. Harris*—the 4–3 decision ordering a statewide manual recount of the "undervote" ballots in all counties in which those ballots had not already been manually tabulated. What you see in the Florida high court's opinions in *Gore v. Harris*—in both the majority opinion and in the dissents—are jurists laboring under excruciating constraints to get the right legal answers to a complex legal problem.

The truth about the Florida Supreme Court justices' handling of *Gore v. Harris* runs counter to a couple of myths purveyed by partisans and pundits about that high court, whose justices were appointed by Democratic governors. But the partisans and pundits are off-base. To underscore where the U.S. Supreme Court went wrong in *Bush v. Gore*, let's clear away the prevailing myths about the supposedly partisan Florida Supreme Court and give its justices credit for what they, unlike their federal counterparts, did right.

Myth One: The partisan, "Democrat-dominated" Florida Supreme Court screwed up its own state law in its eagerness to give the election to Al Gore, so the U.S. Supreme Court had to step in to correct the problem.

In reality, the Florida legislature had presented the courts with a crazy quilt of ambiguous and/or self-contradictory election laws. Additionally, the Florida Supreme Court was faced with a decision in which a trial court judge (in the word of the majority opinion) "did not make any findings as to the factual allegations made in the complaint and did not reference any of

the testimony adduced in the two-day evidentiary hearing, other than to summarily state that the plaintiffs failed to meet their burden of proof."

Apart from seeming to dispense with his role as fact-finder, Judge N. Sanders Sauls also seemed to conflate the "protest" and "contest" phases of disputing an election in Florida (and the differing burdens of proof required in each phase). When a trial court judge reaches factual and legal conclusions in a summary, arbitrary, or legally questionable way, he creates the kind of issues that state appellate courts were created to sort out. And a fair-minded reading of the Florida Supreme Court's decision shows it struggling mightily to do so fairly and even-handedly. Consider: Of the five arguments made by Gore's team, the Florida Supreme Court's four-justice majority accepted only three. Ruling against Gore on the other two arguments ensured that some additional Bush votes would be included in the final count, and that the additional 3,300 votes from Palm Beach County, most of which were thought to be for Gore, would not be counted. Also, three of the court's seven Democrat-appointed justices would have ruled against Gore altogether.

Congress, not the federal courts, has the authority to resolve disputes involving presidential elections. The U.S. Supreme Court stepped over the lines that supposedly constrain federal court authority.

If the Florida Supremes were really the judicial-activist, partisan-Democrat meddlers its GOP critics say they were, they would have come up with some chad-centric standard as to how to interpret ballots that vote-counting machines rejected. Unfortunately for Al Gore, it was the refusal of the Florida Supreme Court to legislate a new, precise, statewide standard for interpreting ballots—a refusal to be a judicially active, changing-the-rules-in-the-middle-of-the-game kind of court—that led the U.S. Supreme Court to decide that Florida's election-code provisions violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

Myth Two: The Florida Supreme Court usurped the prerogative of the Florida legislature to decide how its state's electors are chosen, in violation of both state and federal law.

In fact, the Florida Supreme Court was doing just what it was supposed to do, consistent with Article II of the U.S. Constitution, with the federal elector-selection statute, and with state election law. It's true that Article II (later modified by the 12th Amendment) gives to state legislatures the power to pick a slate of electors for the Electoral College. But that doesn't exclude the state courts from playing *any* role. Federal lawmakers have always known that state judges might have to do so. Title 3, Sec. 5, of the U.S. Code, for example, contemplates that disputes arising from state elector-election contests may be decided by a state's judiciary, provided that the law under which that contest is decided was in place before Election Day. As it happens, Section 102.168 of the Florida Statutes—in place before Nov. 7—allows for Florida elections, other than those for the state's house and senate, to be contested in Florida courts.

The same Florida election statute authorizes a judge to "fashion such orders as he...deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under the circumstances." In other words, critics of the Florida Supreme Court's broad recount are giving no weight to the fact that Florida election law expressly allows the Florida judiciary to do all sorts of things in handling election disputes. Anyone looking for a source of the Florida Supremes' authority to order a statewide manual recount of "undervotes" need look no further.

One of the rules that arguably governs how Florida courts must deal with contradictory directives of the Florida legislature is that a court must interpret the state election code whenever possible in ways that don't lead to absurd or meaningless results. For example, the courts should reject rigid, formalistic reading of ambiguous or contradictory provisions if such a reading doesn't serve the legislative purpose of a statute, or if it actively undercuts it. It's this sort of reasoning that led the Florida Supremes to conclude that the resolution of a contest requires only the statewide manual counting of contested "undervotes" rather than of all the votes (as the Bush team argued). What's the point of wasting time with uncontested ballots when the dispute is over a much smaller number of contested ones?

Maybe you don't buy that conclusion, but a conclusion that favors one political candidate over another is not in itself proof of partisanship. When you read the Florida Supreme Court's majority opinion, you see an immense effort to adhere to what the court believes the Florida legislature has defined its role in election-law questions to be. "This essential principle, that the outcome of elections be determined by the will of the voters, forms the foundation of the election code enacted by the Florida Legislature and has been consistently applied by this Court in resolving elections disputes," the Florida majority writes. Both the majority decision and the dissenters' opinions in *Gore v. Harris*, even though they reach differing conclusions, are reasoning in ways consistent with standard jurisprudential principles. As important, they are laboring to adhere both to their own judiciary's general body of precedent and to the specific legal and factual constraints of the case before

them. I would not have been greatly troubled if the Florida Supremes had gone 4–3 against a statewide, court-ordered manual recount. That's because a constitutional theorist perusing the majority's and the dissenters' opinions in *Gore v. Harris*, can see a principled jurisprudential path to either result.

The picture of the Florida justices' reasoning processes we get from both the majority and the dissents casts the U.S. Supreme Court's majority in *Bush v. Gore* in a highly unflattering light. Unlike the Florida justices in *Gore v. Harris*, the majority in *Bush v. Gore* seems to have acted as partisans, exceeding the well-understood limitations on federal judicial power. The U.S. Supreme Court majority showed only nominal reluctance to make new law (by finding that the 14th Amendment's Equal Protection clause applies to vote-counting standards) and to assert control over the outcome of a disputed election. Unlike the Florida courts, the federal courts have no express role in disputed elections, and in fact both the Constitution and federal law give Congress, not the federal courts, the fundamental authority to resolve disputes involving presidential elections. What's more, the U.S. Supreme Court stepped over the lines that supposedly constrain federal court authority in the service of plainly shallow and inconsistent reasoning.

It's disconcerting that three justices that identified with the states' rights theory of federalism were willing to abandon that theory in service of a highly creative "interpretation" of a federal statute.

The U.S. Supreme Court has no special grant of authority to deal with election issues—not even those arising in federal elections—absent some larger federal statutory or constitutional interest. At bottom, the U.S. Supreme Court is one of defined and limited power, as spelled out in Article III of the U.S. Constitution. You can tell how eager the majority was to involve itself in *Bush v. Gore* by how much effort the justices in the majority gave to finding a basis for their jurisdiction, and by how shallow and problematic the arguments for such jurisdiction turned out to be.

Ultimately, the attempt to find a basis in Title 3 of the U.S. Code, which sets up a statutory framework for Congress' handling and interpretation of the states' slates of electors, was a washout. Only three justices were willing to stomach the transmuting of these federal laws, which were designed to mandate and limit Congress' conduct, into a limitation on state courts. Still, it's disconcerting that these three justices, heretofore identified with both the states' rights theory of federalism and with a focus on the plain text of the statutes they must interpret, were willing to abandon those theories in service of a highly creative "interpretation" of a federal statute—one that, had it gotten two more votes, would have amounted to a bald federal pre-emption of the states' authority to control their own process of selecting electors.

The equal protection theory that ultimately led the U.S. Supreme Court to effectively decide the election in Bush's favor is not in principle so jurisprudentially perverse as the Title 3 theory, and ultimately some elements of the equal protection theory won the support of seven of nine justices. Here the perversity isn't inherent in the theory itself but in what five justices were willing to do in the name of the 14th Amendment's Equal Protection clause.

The majority's equal protection argument begins with the well-established principle that the 14th Amendment's Equal Protection clause prohibits state governments from treating some citizens worse than others when that different treatment is based either on their identity and background or violates "fundamental fairness." Voting is a basic right, so the fact that some Florida counties use different standards than other Florida counties when participating in a statewide manual recount of "undervotes" at least raises the possibility that some citizens' rights under the Equal Protection clause have been violated. Similar arguments may be grounded in the Florida Supreme Court's focus on undervotes, which might be said to be unfair to those whose ballots were rejected as "overvotes" (with more than one presidential vote apparently marked on the ballot), or in the fact that all ballots, rather than just the undervotes, were recounted in some but not all counties.

Who can argue with the general principle that no person's vote should count more or less than any other's? But the devil's in the details, and both the factual situation in Florida and the remedy imposed by the U.S. Supreme Court raise doubts about how much the five justices who voted to stay and later to bar the manual recount really cared about the equal protection or "fundamental fairness" issues.

For one thing, it's unclear that the differences in ballot-counting standards among Florida counties add up to a constitutional violation of such magnitude that the U.S. Supreme Court needed to step in. Whatever rule might be used (counting dimpled chads, say, or refusing to count them), the rule itself won't inherently favor one candidate over another and thus won't favor one candidate's voters over the others'.

For another, different counties in Florida use different kinds of voting machines and ballot-counting machines, with the now well-documented result that some systems reject more legal ballots than others do. The Supreme Court's order blocking manual recounts ensured that votes in one county are more likely to count than votes in another county.

Compounding this latter problem is the fact that ethnic or racial minorities may be more concentrated in counties that use the less-reliable voting-machine technologies. Thus, blocking manual recounts may have had a disproportionate effect on certain voting minorities. This isn't the result a court is normally looking for when it invokes the Equal Protection clause and claims to be protecting fundamental rights.

As to the purported neglect of "overvotes," the dissenters rightly pointed out that no one had presented evidence of an overvote problem. In other words, the majority was so eager to find an equal protection violation that they assumed facts not in evidence.

The majority was aware of these details, which strongly suggests that these five justices' invocation of the Equal Protection clause was opportunistic and maybe even hypocritical. In effect, the Supreme Court was saying "We had to refuse to count your (possibly incorrectly rejected) votes in order to vindicate your right to have your votes counted fairly."

Which brings us to the question of what vital, constitutionally significant interests were being served by the U.S. Supreme Court's decision to block the Florida Supreme Court's statewide manual recount of undervotes, with the result that some votes would never be counted in time to affect this election? The best the justices in the majority can offer is this, in Scalia's concurrence to the initial stay of the recounts: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." Earth to Scalia: If improperly conducted recounts risk generating such a cloud, a court-mandated halt of the recounts is not exactly clear-skied if legitimacy is your concern.

Another notion the five justices advanced was that the ticking of the Electoral College deadline clocks meant that the Supreme Court needed to impose finality on the election dispute. But it's hard to see how this need for finality, even if true, required that the U.S. Supreme Court prevent the Florida Supreme Court from even trying to craft a remedy consistent with the finding of an equal protection violation. Suppose Florida's high court had been unable to resolve the issue by any deadline—so what? As Justice Breyer pointed out in his dissent, "The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by state courts. See 3 U.S.C. 5 (providing that, where a 'State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of...electors...by judicial or other methods,' the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court."

We'll get the chance to see how well the majority's commitment to equal protection holds up. Despite the justices' attempt to limit their new doctrine, it is an invitation to future candidates to mount such challenges.

If the blocking of the recount, which resulted in the effective erasure of many citizens' votes, was not enough to cast doubt on the Supreme Court majority's commitment to equal protection and fundamental fairness, the majority's attempt to limit the impact of its newly discovered equal protection issue to this particular case would be. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities," writes the majority in its unsigned opinion. In other words, the majority seems to be saying, we believe Florida's election code issues add up to an equal protection problem only insofar as they raise the possibility that George Bush might not win Florida. But don't expect us to be bound by this decision in future cases.

We'll get the chance to see how well the majority's commitment to this equal protection issue holds up. Despite the justices' attempt to limit the effect of this new doctrine, it will be an invitation to future candidates to mount federal equal protection challenges to every state-based resolution of an election dispute. Finality, the thing the majority seemed to value more highly even than citizens' rights to have their votes counted, may be yet another casualty of *Bush v. Gore*, as state election-dispute cases increasingly lead to simultaneous or subsequent litigation in the federal courts.

But the biggest casualty of all is the credibility of the Supreme Court as a principled arbiter of the Constitution and of federal law. It's a shame that the Court did not meditate long enough on one of the key observations from the Florida Supreme Court's Chief Justice Wells, who warned in his dissent in *Gore v. Harris* of the hazards of a court's being too willing to intervene. "We run a great risk that every election will result in judicial testing," wrote Wells. "Judicial restraint in respect to elections is absolutely necessary because the health of our democracy depends on elections being decided by voters—not by judges."

Whatever one may think of the Florida high court's handling of the election cases, there's no disputing that when it comes to lack of judicial restraint, it's the U.S. Supreme Court that takes the prize. ◆

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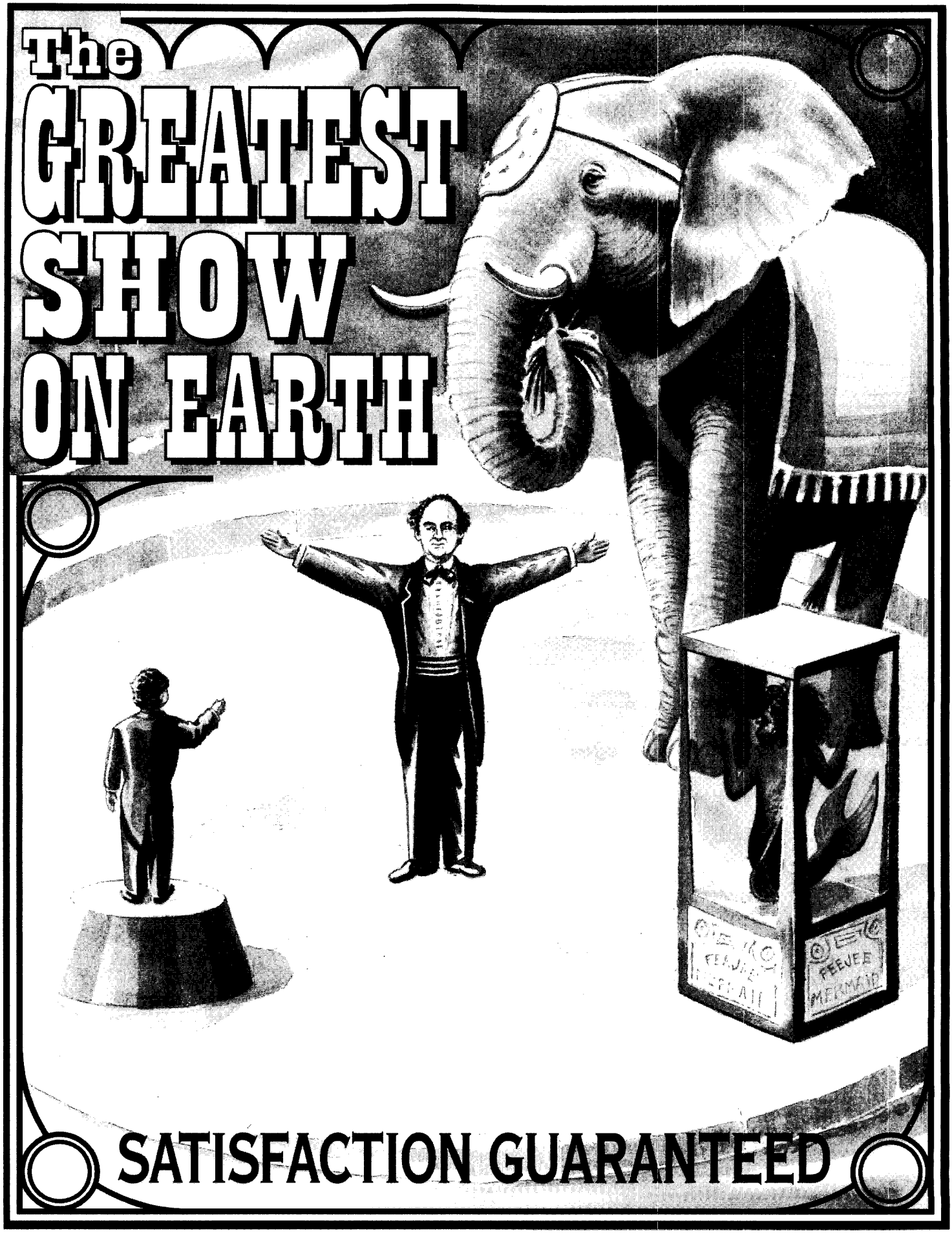
The
GREATEST
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St. Phineas

How P.T. Barnum helped invent business ethics

By John Mueller

The legendary impresario P.T. Barnum (1810–1891) is best known as a consummate charlatan whose perspective on life and business is summed up in the contemptuous contention, "There's a sucker born every minute." It is testimony to the power of first impressions that this popular image persists even though it is very substantially wrong. In fact, not only did the great showman never make the statement, but it would have been wildly out of character for him to have uttered it.

Contrary to his popular image, Barnum generally conducted his business enterprises in a virtuous manner, respecting his customers and making sure they were satisfied. Indeed, he was among the first to appreciate fully—and to articulate—that an honest approach was the most reliable path to long-term wealth. He was, in other words, one of the pioneers of business ethics.

As A.H. Saxon points out in his superb biography, *P.T. Barnum: The Legend and the Man* (1989), much of the fault for the showman's lasting reputation lies with Barnum himself. In 1854, at the strikingly early age of 44, Barnum penned the first edition of his autobiography. In it, he frankly and exuberantly exposed the various deceptions and "humbugs" of his early business life. Notorious among these was his managership of a mentally agile, if physically decrepit, 80-year-old black woman who claimed convincingly not only to be 140 years old but to have been George Washington's nurse. Then there was his exhibition of the absurd and disgusting "Feejee Mermaid" that seemed upon examination to be the head and upper torso of a dead monkey crudely sewn to the body of an equally dead fish—which is exactly what it was.

That early autobiography has now been reprinted by the University of Illinois Press with a lively introduction by Terence Whalen, a literary scholar at the University of Illinois-Chicago who specializes in 19th-century America. Both the reprint of the autobiography and Whalen's introduction will probably serve to perpetuate the image of Barnum as a con man.

The Life of P.T. Barnum: Written By Himself, Urbana: University of Illinois Press, 404 pages, $14.95 paper

In his *Life* and other writings, Barnum attempted to defend himself from the negative image with two stratagems. First, he insisted that his book performed a public service by exposing deceptive business practices. For example, at the age of 19, he engaged in the lottery business and was shocked to discover that only a rather small percentage of the take was paid out in prizes—about the same as in state lotteries of our own day, as it happens. He emphatically, if ineffectually, warned people against squandering their money on this "ruinous infatuation."

As Whalen observes, however, he never really *apologized* in this autobiography for any duplicitous business behavior, and it is easy, if not entirely fair, to join Whalen in dismissing such somewhat sanctimonious and self-conscious protestations as an effort to profit doubly from the deceptions: first by carrying them out, then by exposing them in a lucrative book.

Barnum's more compelling defense was quantitative, again in a double sense. To begin with, the colorful "humbugs" of his early career represented only a small portion of his business efforts. He pointed out that the vast majority of his enterprises were in fact "undoubtedly legitimate." There was, in particular, his exhibition of the truly talented midget Tom Thumb (Barnum did admit to exaggerating the age of the crowd-pleasing performer) and his wildly successful management of the "Swedish Nightingale," soprano Jenny Lind, whose tours, Barnum suggested with some reason, helped elevate and refine the country's musical tastes.

More pertinently, Barnum made an important financial discovery during the course of his business career. He observed that nearly all his deceptive schemes "ended in disaster," reducing him "to the pinching income of $4 per week," whereas his fortune derived almost wholly from the legitimate enterprises.

Barnum thus learned that, in business, virtue is considerably more than its own reward. News about this discovery can easily be lost when it is imbedded among picturesque yarns about humbugs, but it was of great significance to Barnum, and, more broadly, it was probably important to the massive economic expansion that took place in what we now call the developed world during and after his lifetime.

The first third of the autobiography is devoted to life, and particularly business life, as Barnum experienced it in

TIM SPOSATO

Bethel, Connecticut, during his first 25 years. Judging from his description, business in general was often characterized by deception, fraud, and swindle. As a consequence, people continually had to be alert to the possibility of being cheated by confidence schemers and sharp dealers. The expression "Yankee trader" carries this cautionary connotation to the present day.

Barnum's great discovery was not so much that such behavior is immoral but that from a business standpoint it is *stupid.* Toward the end of his autobiography, Barnum was already groping toward a set of business principles that developed this key insight. In the next years, he worked his ideas into a lecture, "The Art of Money-Getting," and gave it widely with great success (and financial profit), eventually incorporating it in 1869 into his second, more circumspect, autobiography, which he titled—with typical self-effacement—*Struggles and Triumphs.*

This remarkable tract is filled with the kind of wisdom that successful business people now generally take for granted. Integrity and honesty make sound business sense, argued Barnum, because "no man can be dishonest without soon being found out and when his lack of principle is discovered, nearly every avenue to success is closed against him forever." Therefore, "as a mere matter of selfishness," he concluded, "honesty is the best policy."

Similarly, Barnum argued that fair trading is the best method for carrying out business if one is pursuing long-term advantage. "Men who drive sharp bargains with their customers, acting as if they never expected to see them again, will not be mistaken," he wrote. And it is good for the bottom line to treat people well: "Politeness and civility are the best capital ever invested in business." Moreover, although charity should be "a duty and a pleasure," there is advantage to it as well. Noted Barnum, "even as a matter of policy, if you possess no higher incentive, you will find that the liberal man will command patronage, while the sordid, uncharitable miser will be avoided."

By and large, Barnum carried out his various enterprises in line with such principles. He treated his employees and performers with respect, his customers with civility and attentiveness, and his fellow deal makers with integrity and reliability. Nothing illustrates this better than Barnum's experience with the circus, an enterprise he took on late in life, and the one that has become most associated with his name.

Before Barnum, circuses were very often run by fly-by-night cheats: ticket takers would regularly short-change customers; pickpockets, working on a commission arrangement with the owners, would roam the grounds; "Monday men" would steal the wash from clotheslines or burglarize homes when townsfolk were at the performance or watching the circus parade; and games of chance would be fixed.

Operators made quick profits this way, but soon the entire industry was on the verge of extinction because its customers, through experience, were no longer foolish enough to attend. Barnum was one of the circus innovators who changed all that. He used honest ticket takers, hired private detectives to police pickpockets, and spent a lot of time and money creating what he modestly billed as "The Greatest Show on Earth." Whether customers always fully agreed with that representation, they did find the show, and the whole experience of attending the circus, enjoyable, and they were happy to come back year after year. Accordingly, Barnum and such like-minded circus managers as the Ringling Brothers, applying their own "Sunday School" approach to the enterprise, soon became far richer than the cheats that had preceded them.

"Men who drive sharp bargains with their customers, acting as if they never expected to see them again, will not be mistaken," wrote Barnum.

One of Barnum's biographers, Neil Harris, dismisses "The Art of Money-Getting" as "a collection of platitudes" that merely repeat "the conventional wisdom of [the] era." (He also overlooks Barnum's repeated insistence on the profitability of honesty.) But the examples of the circus and of Barnum's early business experience suggest that these principles were by no means obvious at the time. Moralists have routinely prescribed virtue, but the notion that the application of virtue to the business arena is profitable seems to have been something of a new idea—an innovation. Although one can find earlier glimmerings of Barnum's business principles—in writings by Benjamin Franklin, for example—"The Art of Money-Getting" is the earliest publication I have been able to find in which the profitability (as opposed to the simple moral value) of virtuous business behavior is clearly, specifically, and extensively laid out.

The importance to economic development of this discovery is suggested by one of Barnum's observations: "The public very properly shun all whose integrity is doubted." It follows that when business practices are routinely sharp, uncivil, grasping, and deceitful—as they often were in Barnum's hometown of Bethel—people will tend to avoid doing business because, essentially, transaction costs are high. And economic growth will accordingly suffer. By contrast, when business is conducted virtuously, economies will, all other things being equal, flourish.

By the end of Barnum's life, business in the areas of the world that were rapidly developing was increasingly conducted according to his principles—something that no doubt contributed to that very development. As sociologist Max Weber observed at the time, "Absolute unscrupulousness in the pursuit of selfish interests" was characteristic of "precisely those countries whose bourgeois-capitalistic development...has remained backward." And economist Alfred Marshall noted that although the modern economy had "undoubtedly given new openings for dishonesty in trade," it was nonetheless being carried out with "habits of trustfulness" and honesty "which do exist among a backward people," where, as in the Bethel

of Barnum's youth, business continued to be conducted with "an evil sagacity in driving a hard bargain."

However, Barnum will doubtless continue to be remembered chiefly for his occasional, and mostly youthful, scams and humbugs, not for his discovery of the profitability of virtue in business. Terence Whalen's introductory essay certainly seeks to perpetuate the "soft con" image. He calls Barnum a "serial-hoaxer" in whose hands "poetic license was often a license to steal"; he stresses the showman's "profitable deceptions and schemes," his "knack for making capital out of falsehood," and his "habitual dissembling."

But Whalen's ultimate target is broader. He asserts that Barnum's biography "exposes the illusory or arbitrary nature of an entire economic system" in which the public becomes "victim." Although he acknowledges that Barnum's revenues were substantially derived from repeat customers, he insists that Barnum only "occasionally" gave the public its money's worth. Endlessly, if creatively, duped, Whalen suggests, paying spectators became "the unwitting progenitors of modern consumer society." Clearly, it is Whalen, not Barnum, who imagines the public to be a self-perpetuating confederation of suckers.

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Beyond Taste

The perils of defining art

By Charles Oliver

OK, so she said that Mickey Spillane and Ian Fleming were the great Romantic writers of her day, the rightful heirs to Walter Scott and Alexander Dumas. She dismissed Shakespeare—William Shakespeare—because he didn't believe in free will. And Ludwig von Beethoven's music was lousy, she proclaimed, because it was shot through with a malevolent sense of life.

But are these facts sufficient reason to dismiss Ayn Rand's ideas on art? By their silence, most critics have answered an emphatic (and understandable) *yes*. Now, nearly two decades after her death, critics who aren't necessarily worshipful acolytes are beginning to address, and sometimes trying to correct or expand, Rand's thinking. Rand's aesthetics, presented most fully in her essay collection *The Romantic Manifesto* (1969), are explained and critiqued in *What Art Is* by Louis Torres and Michelle Marder Kamhi. Torres and Kamhi are editors of the journal *Aristos*, which skews decidedly to the culturally conservative end of the arts spectrum. (Historian Jacques Barzun and novelist Mark Helprin are among its contributors.)

Torres and Kamhi treat Rand's aesthetics with respect, though not with slavish devotion. They don't hesitate to correct her when they think she is wrong, or where she substitutes simple personal preference for ostensibly rational theory. One great irony suffuses *What Art Is*: Though Rand as a political philosopher advocated mostly untrammeled liberty, Torres and Kamhi's book hints that defending her "objective" standard of art may provide support for censorship.

What Art Is: The Esthetic Theory of Ayn Rand, by Louis Torres and Michelle Marder Kamhi, Chicago: Open Court, 523 pages, $21.95

Before explaining their own views on art, Torres and Kamhi address the most typical extant definition of art. Art, say many, is that which artists produce—a perfectly circular definition. What is an artist? Someone who produces art. So what is art? You get the picture. A similar problem faces a related set of questions: Art is what hangs in museums or galleries. What are galleries or museums? Places that display art. Following Rand, Torres and Kamhi seek to avoid such tautologies and fashion a proper definition of art by asking what purpose it serves.

"Art brings man's concepts to the perceptual level of his consciousness and allows him to grasp them directly, as if they were percepts," wrote Rand. While man is a conceptual thinker, she argued, it brings us special pleasure and insight to turn concepts into more readily grasped percepts. In this reading, art is (or should be) a selective recreation of reality according to its creator's metaphysical value judgments. An artist isolates those aspects of reality he deems fundamental and integrates them into something concrete, allowing others the pleasure of contemplating them. Torres and Kamhi conclude that utilitarian objects that don't recreate reality—such as baskets and quilts—can't be art. And though Rand disagreed, they conclude that architecture isn't art for the same reason.

But art is plainly more than just the recreation of reality. It is the recreation of reality "as perceived by a conceptual consciousness," to quote Rand. The ramifications of this requirement are most obvious in visual arts such as painting and sculpture. We don't see mere shapes or color. We see objects, and we see them in the context of our knowledge. Hence, as I write this, I'm not looking at some square object with a flat glass face. I'm looking at a computer monitor.

"Rand...implies that so-called abstract art is not art at all, since it reduces the visual field to 'mere sense data,' in effect by eliminating the representation of objects or entities," Torres and Kamhi write. They agree with Rand on this point and go on to provide a fascinating critique of the muddled thinking of most modern artists and critics, and of the work those artists produce. Piet Mondrian, for instance, famously argued that physical objects "must be banished" from art, which must represent only "pure relationships." Of course, Mondrian wasn't too clear about how relationships could be portrayed without showing the things that were related.

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Epic Jazz

Ken Burns' latest film teaches an unintended lesson in musical ecstasy

By Charles Paul Freund

The opening note of *Jazz*, Ken Burns' 10-part documentary for PBS (available on video), comes from trumpeter Wynton Marsalis, who's not playing but lecturing. "Jazz music objectifies America," he tells us, then offers a lesson about what jazz really is. The form's great power emerges from musicians who "negotiate their agendas with each other." According to Marsalis (he's Lincoln Center's official jazz master), that negotiation, that handing off and passing around of inspiration—that jam—is jazz's transcendence.

Most jazz musicians would agree. As the cliché goes, it's one thing to do a show for your paying customers, playing what they expect and have paid to hear. But after the squares go home, you can stop blowing shit and make another kind of music altogether. Yet many musicians would also agree that, more often than not, it's a lot more satisfying to play that personal kind of music than it is to sit and listen to it. Jazz musicians involved with each other in intimate creativity may well be negotiating their way to improvisational sublimity, but they've often left the audience out of the musical deal.

This is a central but rarely acknowledged tension in Burns' documentary treatment. Neither Burns nor PBS would present nearly 19 hours of archival footage and contemporary performances and interviews unless the series could claim, as it does repeatedly, that jazz is a fundamentally American art form that reveals much about the culture from which it has sprung. But it would reveal nothing if jazz had not been a commercial form to begin with, if—to put it in Marsalis' terms—its original makers had not hungrily included the customers in the negotiation. For all its knowing (and legitimate) commentary about expressive artistry, for all the context of romantic creation, Burns' film actually works best when it showcases jazz as an opportunity for its audience's ecstatic pleasure.

Albert Murray, one of American culture's best critics (because his work is broadly instructive, rather than narrowly judgmental), puts the matter directly in one of his appearances. Playing a contrapuntal riff to Marsalis' Professor of Negotiation Studies, Murray says simply, "Jazz is dance music." That doesn't mean jazz isn't also a lot of other things. But it does mean that jazz's artistry is deeply rooted in sensual pleasure. The farther jazz has strayed from those roots, away from breathless, sweat-beaded ecstasy, the more clubs have closed, the more radio stations have switched programming (often to jazz's rhythm-and-blues-based offspring), and the nearer it has approached its appointment with public broadcasting. PBS has fallen into the role of cultural memorializer, the celebrator of moribund genres.

Yet Burns' series, its self-conscious gestures toward epic notwithstanding, is filled with rewards, many of them proffered unintentionally. Jazz is indeed an American story, which means that art and commerce need not be separate and opposing forces. The former triumphed through the latter, rising from whorehouse scorn in such places as New Orleans and Kansas City to find an enthusiastic audience despite the original dismissal of gatekeeper critics (Gilbert Seldes notably excepted), editorialists, and even doctors, before eventually falling into the suffocating embrace of Lincoln Center itself.

Burns doesn't set out to tell that tale, but that's the story that emerges, over and over again. Burns' documentary gifts are not visionary, analytical, nor even properly historical. Rather, he is a talented biographer, and his films are most effective when he is able to present an overarching narrative in terms of the biographical detail of that narrative's participants. The approach worked especially well in his Civil War series, because it unexpectedly humanized the war. It didn't work so well in his baseball series, because the mass of detail tended to obscure the game itself; few sports fans really want to know their heroes out of uniform.

But as Vasari might have told Burns, biography—even when it's legend—is a good way into culture. Thus we have a century's worth of the lives of the jazz men and women, told sequentially and profusely illustrated. (The rap against Burns is that he has left some important people out of his group portrait, a charge he invites by claiming epic comprehensiveness.)

What has Burns revealed? Given 19 hours in praise of every kind of jazz, viewers can

:ake away every kind of moral. But one esson that seems hard to ignore is that ·azz was at its strongest when its makers embraced their audience and used their popularity to develop the audience musically, even leaving themselves open to earning something from that audience. Anybody can play the contemptuous ohemian, a type that was eventually to overwhelm the world of ever-more-isolated jazz makers.

The real artistic work lies in forging a connection with the audience, inviting it o share in the innovation. That's actually a rhetorical skill as much as it is a musical one, and is on display in every frame Burns includes of Louis Armstrong. Armstrong was as immensely influential as he was not only because he was a great trumpet player, but because

Jazz is indeed an American story, which means that art and commerce need not be separate and opposing forces.

ıe embraced his audience, was anxious that it enjoyed itself, and was thus able to :ake it with him, note by soaring note.

Perhaps the most instructive sequence ın Burns' series involves Armstrong's character opposite, Duke Ellington. Ellington's whole career was built on a remarkable marriage of jazz, elegance, and dignity (traits embodying the cultural longings of Ellington's black Washington, D.C., milieu). Yet in 1956, with ·azz receding into elitist taste and his own career in the balance, Ellington jumpstarted his creative life by nearly starting a riot at the Newport Jazz Festival. Characteristically, Ellington had composed a ong, serious suite for the occasion. But when he saw his audience heading early or the parking lot, he broke the band ınto "Diminuendo and Crescendo in Blue," a hard-driving work he'd written ın 1937. The crowd turned back. Famously, one beautiful woman started to dance, and the crowd gathered around her. Ellington dug into the number, even when the worried festival impresario signaled for him to cut it off before the usually polite Newporters got violent. Saxophonist Paul Gonsalves did 27 choruses, and the band followed with four encores. "I was born at Newport," Ellington liked to say afterward.

There's also a cautionary tale for this theme of audience embrace: the career of Miles Davis. Davis had enjoyed success as a musician of aloof cool, but started to chafe when pop groups like Chicago used his riffs to get very rich. Davis actually asked his label to stop calling him a jazz player at all, having concluded that it was a barrier to reaching a larger audience and making real money. He eventually was to find that audience, at least for a while, by playing the rock-jazz mix known as fusion. But many people agree that this was a dead end for both Davis and his listeners.

Why? The answer again has to do with the issue of musical negotiation. Davis' musical identity was originally built on artistic distance, on insisting that the audience come to his music. But when he switched strategies and went in search of a larger audience, he made the (perhaps inevitable) mistake of staying aloof: He never learned how to teach his new audience what he wanted it to appreciate, or for that matter to learn from it either. In the albums that follow 1970's *Bitches Brew*, Davis doesn't seem to know what he wants to play. Sustained success is not just about a happy, buying audience. It's an ongoing dialogue—a negotiation.

The same is true for many other forms, of course. But jazz's lesson is especially valuable because, for one thing, its compressed history is a fractal of those other cultural histories. For another, jazz's history is suffused with unmitigated pleasure. Burns gives his audience 19 hours of that history, a lot of time for a lot of extraordinary people to play and find (posthumously, in many cases) another generation of admirers to talk with. Never mind the lectures: What a concert.

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In fact, following psychologist Louis Sass, Torres and Kamhi argue that much modern art embodies the worldview of the extreme psychotic. They cite neurologist Oliver Sacks' 1990 book *The Man Who Mistook His Wife for a Hat* to illustrate their point. Sacks tells of a man who suffered from a neurological disorder that left him increasingly unable to identify visual objects. The man was a gifted amateur painter whose early work was extremely realistic and finely detailed. But as his condition worsened, his paintings became more abstract and chaotic. When Sacks commented on this visual record of the man's deterioration to the patient's wife, she chastised him for being unable to appreciate her husband's growth as an artist.

Rand often seemed to believe that the actual world she lived in was filled with depravity. Could we gauge anything about her morality, or her "sense of life," by her taste in art?

While they defend Rand's theory of art, Torres and Kamhi admit that she often simply privileged her own particular tastes in art without sound logic. "Art is man's metaphysical mirror," Rand asserted. Hence she believed that by looking at what sort of concepts a man enjoys seeing concretized, you can accurately judge the state of his soul. Rand herself wanted to see the concept of "man as hero" projected. She thought art should present "the values man *is to seek*" and "the concretized vision of the life he *is to achieve*" (her italics). She thought art should be emotional fuel, helping man contemplate and momentarily live in a world where values are achieved and virtues rewarded. (Whether the vision of civilization collapsing in misery that makes up most of her magnum opus *Atlas Shrugged* meets this definition is another question.)

Rand was notorious for pronouncing

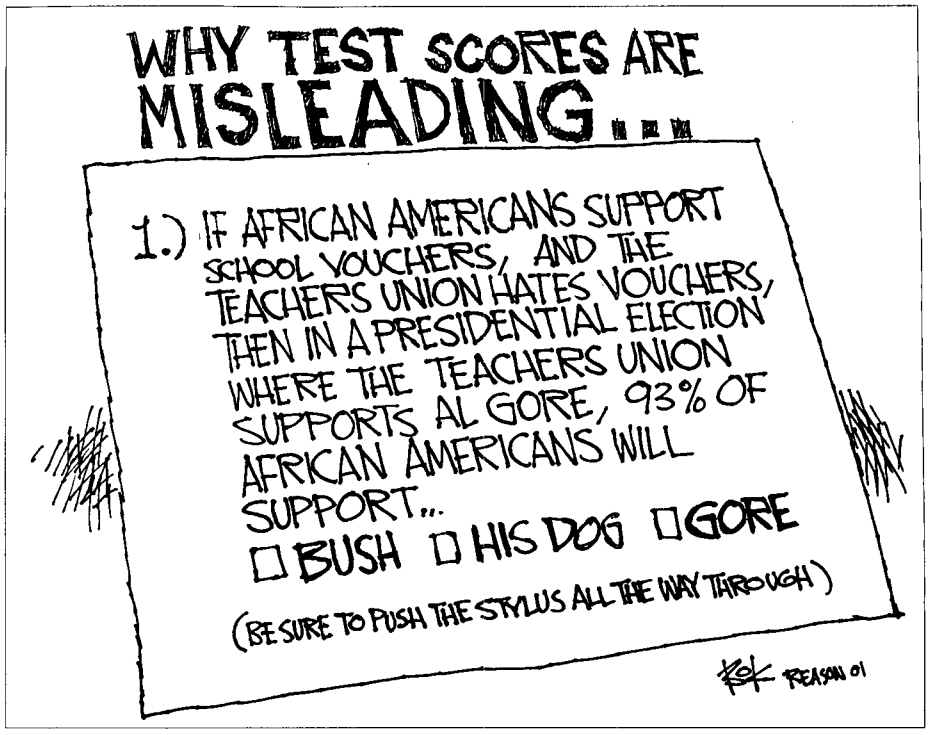
harsh moral judgments on those whose tastes differed from hers. She called those whose tastes differed from her own "irrational," and she declared that "what an irrational man seeks to see is a justification...of his own depravity, as a last convulsion of his betrayed self-esteem."

Torres and Kamhi find Rand's view much too simplistic. For them, Rand's quickness to link a personal response to art with moral depravity goes too far. Rand thought a person's "sense of life" determines his response to art. This sense of life, Rand said, is "an emotional, subconsciously integrated appraisal of man and existence." It is determined very early in life and is hard to change later. Torres and Kamhi argue that a person's sense of life influences his personality, but not necessarily his character, which is formed more by his conscious ideas and by the absorption of social norms. In other words, a person with a negative sense of life may or may not be a gloomy sort who loves sad music, but that doesn't mean that he is dishonest or irrational.

In fact, if one were so inclined, one could point out that Rand, who preferred stories of heroic supermen, often seemed to believe that the actual world she lived in was filled with little but depravity. Could we gauge anything about her morality, or even her "sense of life," by her taste in art?

Torres and Kamhi argue that Rand's aesthetics neglected her own argument that something has value only to an individual, and individuals value things only in a specific context. This implies, though Torres and Kamhi don't say so explicitly, that individuals have different needs for art and make different uses of it depending on circumstances. For instance, we may want to see how the world looks through different eyes, even if we disagree with a particular artist's assessment of the world. Rand seemed to acknowledge as much when she named Fyodor Dostoevsky as one of her favorite writers, even though both his sense of life and his conscious philosophy differed greatly from hers. No one will confuse Raskolnikov with Howard Roark.

Rand hemmed in her aesthetics with "shoulds." An emotionally healthy human being, in Rand's view, ought to like certain kinds of art. She thought most 20th century art styles were "dominated by the attempt to disintegrate man's consciousness and reduce it to mere sensations, to the 'enjoyment' of meaningless colors, noises and moods"; this preference, she argued with characteristic hyperbole, was not simply in bad taste but downright evil. But individuals could have many contextual reasons for valuing or enjoying a given work or style of art that extend beyond Rand's very limited personal vision of what art was for and what it should do.


WHY TEST SCORES ARE MISLEADING...
1.) IF AFRICAN AMERICANS SUPPORT SCHOOL VOUCHERS, AND THE TEACHERS UNION HATES VOUCHERS, THEN IN A PRESIDENTIAL ELECTION WHERE THE TEACHERS UNION SUPPORTS AL GORE, 93% OF AFRICAN AMERICANS WILL SUPPORT...
☐ BUSH ☐ HIS DOG ☐ GORE
(BE SURE TO PUSH THE STYLUS ALL THE WAY THROUGH)
REASON 01

Torres and Kamhi point out that even Rand's official "intellectual heir" and literary executor, the philosopher Leonard Peikoff, has acknowledged that "one 'can respond to tragedy without having a tragic sense of life,' one 'can have a tragic sense of life without being in any way immoral, corrupt, or evil,' and one 'can have a tragic sense of life and still be one hundred percent honest, rational, and moral.'"

In short, a person's taste in art may tell us something about his life. But it's just as likely that it doesn't. Until we have a far greater understanding of how people use art, and unless we know a great deal about the particulars of the person's life, we are wise to draw no conclusions about his mental or moral state.

The realization that different people value art for different reasons and in different contexts raises another question relevant to this discussion: Do we really need an airtight, objective definition of art? Why argue over how to distinguish art from non-art? If you like it, and it moves you, shouldn't that be the end of the definitional debate, even as conversations about the merits and meanings of a given work continue? Torres and Kamhi argue that the definition of art has ramifications beyond aesthetics, linguistics, or philosophy. But their attempts to show why the definition of art is important has disturbing implications for free expression.

In a chapter on "Public Implications," Torres and Kamhi point out that the government has played a large role, both directly and indirectly, in promoting the rise of what they consider "non-art." They note that Rand opposed any government funding of art, but the thrust of their argument is that government funding of what they would consider "real" art is less objectionable than funding of non-art passed off as the legitimate thing.

Things don't improve much in their discussion of laws that protect works of art from mutilation or alteration, even by their owners. Such laws, which are common in Europe, have been used to prevent new owners of buildings from removing murals that they didn't commission or sculpture that tenants complain about.

Torres and Kamhi's argument against these laws is based not on an owner's property rights, as Rand would have it, but on the laws' overbroad definition of art. They imply that a building owner's property rights should be infringed to protect what they consider real representational works.

The authors' policy prescriptions go most off the rails in their treatment of obscenity. Current law protects films, books, and music from obscenity charges if they are determined to have some serious artistic value. Given Rand's definition of art, much modern art, especially if it deals with sexual matters, would likely fail this test. Indeed, in their discussion of the controversy over the exhibition of Robert Mapplethorpe's homoerotic photographs at the Arts Center of Cincinnati in 1990, Torres and Kamhi argue that the photographs were in fact obscene. And since Rand holds that photographs can never be art, they seem to believe the jury erred in refusing to convict Arts Center Director Dennis Barrie. The authors seem genuinely disturbed that Barrie wasn't forced to spend some time behind bars.

Despite such problems, Torres and Kamhi make a provocative case for Rand's concept of art. They do so by jettisoning some of her more ill-conceived and rash pronouncements. In the end, however, we are still left with a philosophy that doesn't just criticize much modern art but seems to open it up to censorship. The moral judgments that Rand places on aesthetic decisions shift too quickly to legal ones in the hands of Torres and Kamhi. In the face of such slippage, the benefits of an "objective" theory of art, never self-evident to begin with, are even less clear. Better to say that art is purely subjective. That's not the same as forsaking standards of art. After all, each of us knows it when we see it. It's just that none of us sees things exactly like someone else.

Contributing Editor Charles Oliver (c-oliver @usa.net) writes for Investor's Business Daily.

Double Betrayal

Is liberalism its own worst enemy?

By Loren Lomasky

In the long march from Thomas Jefferson to William Jefferson Clinton, liberalism has undergone a personality change—several, in fact. Originally a political philosophy predicated on safeguarding the individual from unwelcome intrusions, especially intrusions by an overbearing state, eventually it transmogrified into the view that the only way individuals can be adequately protected from each other and from themselves is via a large and ever-growing batch of state interventions. This transformation is now an old and familiar story. Less often recounted, though, is the corresponding transformation of opposition to liberalism. What is it to be an anti-liberal today? Is it to reject the primacy of individual rights in favor of the claims of tradition and community, or is it to affirm those rights against a century of distortion? The evidence of this collection is that it is both, and that the combination is fundamentally incoherent.

It is appropriate that a volume wrestling with itself should carry an ambiguous title. Is "the betrayal of liberalism" a betrayal carried out *on* liberalism or one carried out *by* liberalism? If the former, then liberalism is the disfigured victim; if the latter, it is the perpetrator. The 10 essays contained herein are split; some identify liberalism as the aggrieved party and some as the culprit, and a couple confusedly stumble back and forth, certain that there's something in the political atmosphere that doesn't smell right but unable to identify the offending scent. That a compilation of independently prepared essays manifests a variety of viewpoints is unsurprising, but here we have pieces all of which first appeared in *The New Criterion*, a major intellectual outpost of the new right, and which are advertised by the editors as deployed against a common foe. If a coherent conservative philosophy isn't to be found here, then it likely exists nowhere.

The Betrayal of Liberalism: How the Disciples of Freedom and Equality Helped Foster the Illiberal Politics of Coercion and Control, edited by Hilton Kramer and Roger Kimball, Chicago: Ivan R. Dee, 248 pages, $28.95/$14.95 paper

For former Thatcher adviser Roger Scruton, Jean-Jacques Rousseau is the primordial snake in the Edenic garden of traditional civil society. By insisting on holding up the credentials of ancestral institutions to rational scrutiny and justification, Rousseau began a process of undermining their authority, the costs of which are ongoing and incalculable. For Rousseau and his successors, that which has not been grounded in first principles known to reason has no claim on the allegiance of thinking, self-directed people. Obeisance to traditional forms of life is an unworthy intellectual servitude we must throw off. Familiarity does not count in favor and novelty does not count against, so the efforts of enlightened social engineers to improve old ways are to be welcomed. And if the suggested alterations are radical rather than reformatory, sweeping away venerable customs in the name of progress, well, all the better.

The fallacy in Rousseau's reasoning is that, unlike mathematical theorems, salutary social practices typically are not susceptible to step-by-step rational analysis. Rather, they have arisen via inscrutably complex processes of spontaneous adjustment and readjustment, and they resist being pigeonholed in tidy theoretical niches. This rebuttal to political rationalism was pioneered by F.A. Hayek and Michael Oakeshott, and Scruton borrows freely from them. However, he spectacularly muddles their insights.

On the one hand, Scruton observes that Hayek's arguments support institutions in which the transactors are voluntary cooperators, not pawns of a monolithic bureaucracy. On the other hand, the essay is

go to 63

Big Blue Men

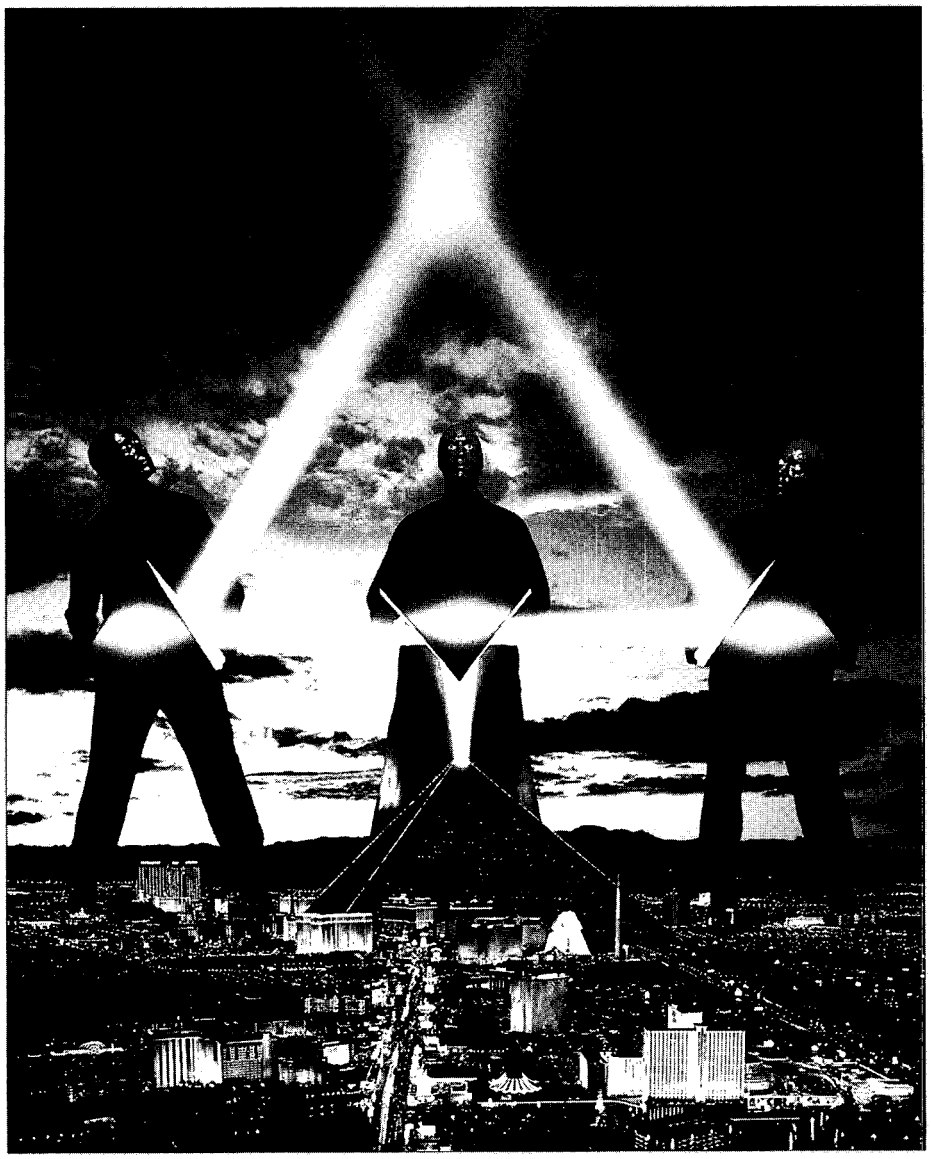
Downtown artists capture Las Vegas

By Sara Rimensnyder

Las Vegas has long been known as the place where once-cool performers go to die slow, campy deaths (think Sinatra) and where never-hip singers build inexplicably large, devoted followings (think Wayne Newton). Since last summer the city of showgirls and Siegfried & Roy has also been home to an altogether different sort of act: the critically acclaimed and wildly popular performance art of Blue Man Group.

At first blush, cutting-edge sensibilities and crass commercialism may seem a strange combination, but it's a wholly sensible, and enjoyable, pairing. Indeed, one of the great appeals of Blue Man Group is the way in which it blurs categories once thought mutually exclusive, including such hoary art-world dyads as artistic success vs. popular appeal and the avant-garde vs. the mainstream.

Twelve times a week at the Egyptian-themed Luxor hotel, some 1,200 tourists take time off from the roulette wheel and pay as much as $75 to watch three bald, cobalt-blue figures throw food, eat Twinkies, and play giant musical instruments made from PVC piping. In oddly memorable vignettes, the blue men, who never speak while on stage, construct a marshmallow sculpture (and slap a $4,000 price tag on it), compete in raucous, oversized drumming competitions, and conduct cheeky, multiple deconstructions of Jefferson Airplane's anthem of adolescent drug use, "White Rabbit." Another part of the show uses electrifying music and a splashy light display to explore what sound might look like if we could see it. Each performance begins and ends with audience participation (including the unfurling of thousands of feet of crepe paper).



JIM PORTO

Blue Man Group was created by Matt Goldman, Phil Stanton, and Chris Wink, and debuted about a decade ago in New York. Since then it has been awash in critical acclaim. *The New York Times* called the group's performances a "deliriously antic blend of music, painting and clowning," and an "ingenious downtown hit." These days, the group is best known for its stylized Intel Pentium III television commercials, in which members fling themselves at walls, slather themselves in green paint, and disappear through floors. Not surprising for an act that appears in TV ads, Blue Man Group is not shy about marketing itself, hawking everything from coffee mugs to keychains at their shows and on their Web site (www.blueman.com). To keep up with demand, there are now about 30 blue men, spread around the country, playing sold-out, permanent performances in New York, Chicago, Boston, and most recently Vegas.

Though the show they've created is exhilarating, Blue Man Group's relatively rare combination of critical and popular success is a spectacle in its own right. Not many artists are able to pitch computer chips on TV,

thrill crowds in Vegas, and still keep the esteem of the New York art world. Yet the group has done so with seeming ease. A December article in the *Village Voice* posed the question inevitably asked of all serious artists who manage to make a living off their work: "So, did they sell out?" The *Voice*'s verdict: "Not at all."

In fact, the Blue Man Group's drums are drowning out a sacred tenet routinely invoked by romantic artists: that commercial reward only comes at the expense of artistic integrity. For the group, there's simply no opposition between the two. Like Warhol and even Picasso before it, the troupe has smartly navigated the endless channels of cool that capitalism creates, and has given an audience

Not many artists are able to pitch computer chips on TV, thrill crowds in Vegas, and still keep the esteem of the New York art world.

something worth paying for. Their ads for Intel, a company with a stake in hipness, are less product endorsement and more prime-time performance art. Similarly, the group's new residence in Sin City plays to the postmodern embrace of kitsch, camp, facade, and, most of all, fun.

On the Vegas Strip, it's the glowing mainstream reception that is perhaps most surprising. Performance art is notorious for its inaccessibility and elitism—when tourists in Manhattan see a show, it's *Annie Get Your Gun*, not the latest offering from Karen Finley. The audience's enthusiasm for the engagingly alien Blue Man Group suggests that we are living in a time and a place where being weird is not only cool, but a selling point. ◆

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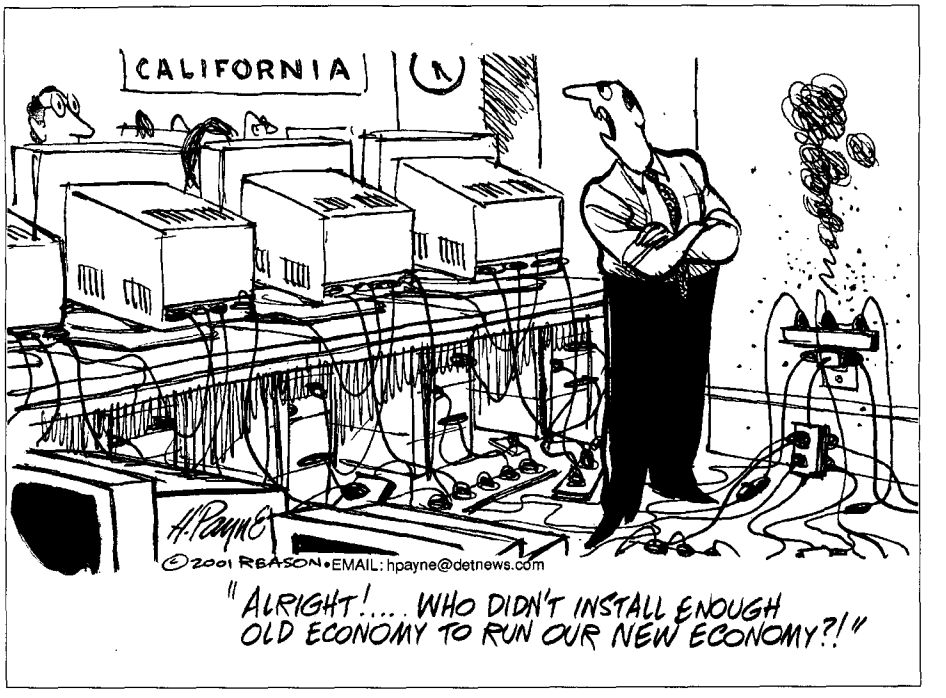

HENRY PAYNE

largely given over to fulminating at modernity's corrosive effect on the authority of Parliament, churches, the military, and schools. These are hardly paradigms of voluntary association and spontaneous order. What they share is hierarchical structure and authority grounded on prescription rather than consent. Scruton is nostalgic for the days when these institutions enjoyed unquestioning deference, but what he considers the corrupted heirs of the Enlightenment insistently demand a peek at their credentials. So in a half-hearted way, Scruton obliges. By way of affording them a jerry-rigged defense, he pilfers an argument central to liberal theory and then twists it into an indictment of liberalism. This is not merely a quirky conservatism but one that completely misidentifies its own foundations. Even the eccentric Jean-Jacques did it better.

Rousseau was a brilliantly original theorist, but he also embraced several potentially tyrannical ideas. For example, his enthronement of the "general will" as overruling the chosen ends of individuals is not simply a bad idea within liberalism; it is flatly illiberal. Although Scruton wildly overstates his prominence within the history of liberalism—Rousseau more often does duty as patron saint to Marxists and other partisans of command-and-control politics—at least Scruton knows his culprits when he sees them.

The same cannot be said for Roger Kimball, *The New Criterion*'s editor. In "Mill, Stephen, and the Nature of Freedom," Kimball identifies John Stuart Mill as the great purveyor of liberal rot. In his best-known political manifesto, *On Liberty*, Mill undertakes to defend the "one very simple principle" that neither private individuals nor the state may justifiably interfere with someone's liberty unless that person is threatening harm to another. Mere unpopularity or the giving of offense does not justify interdiction (consider anti-pornography legislation), nor does the prospect of self-injury (think War on Drugs). Both the individual actor and society at large benefit from freedom of conscience, unconstrained speech, and what Mill dubs "experiments in living." Although Mill was not immune from occasional infections by germs of Victorian wackiness, this stout-hearted defense of individualism has rendered him a liberal icon. Wherein lies the fault?

According to Kimball, taking up a lance originally wielded by Mill's contemporary, James Fitzjames Stephen, it is the espousal of experiments in living. That doctrine, he contends, is multiply defective. First, not all such experiments are glorious successes; many end in ignominious failure. Second, because society is infinitely complex, we

cannot tell in advance which innovations are apt to benefit it and which to make it worse. Third, in promoting these experiments Mill shows himself to be an enemy of custom and traditional morality. Fourth, a Millian liberal is indifferent to the character of those among whom he lives. Fifth, Mill encourages a shallow worship of variety for its own sake. Sixth, Mill is a value relativist. Seventh, by refusing to countenance criticism of others' vices, Millian toleration promotes moral paralysis. And eighth, there is a "feminine tenderness"—[!]—to Mill's thought.

Despite emptying this machine gun clip, Kimball does not so much as nick the target. Mill is entirely aware that, even more frequently than in the laboratory, experiments in living fail. This is not interpretive speculation; Mill forthrightly says as much and then convincingly argues that we ought to be left free to pursue our own personal conceptions of happiness even when we are apt to fall short. (The Declaration of Independence advances a similar claim, but Kimball strangely declines to include that document in his catalog of cancerous liberal tracts.) And although we cannot in any given case confidently forecast the long-term effects of free activity, we have abundant grounds for predicting that the fruits of conformism will be inedible.

Mill does value variety, but not by way of making some shallow fashion statement. Rather, he does so because individuals are themselves distinct, not replaceable cogs in a grand social machine, and respect for this distinctness entails leaving them at liberty to set their own courses as they see fit.

Kimball is similarly off-base in declaring Mill an enemy of common morality. In his essay "Utilitarianism," Mill maintains that received morality embodies the collective experience of the species and thus serves as a generally reliable guide to conduct. It is not, however, flawless or sacrosanct, and the optimal environment for its improvement is a framework of "ordered liberty."

Kimball's (and Stephen's) most revealing lapse is a chronic inability to distinguish toleration from approval. The charge that Mill believes it inappropriate to criticize people's character and their way of life is breathtakingly obtuse. Mill is one of the most eloquent such critics of his century, not least within the pages of *On Liberty* itself. How could he advocate every other variety of liberty yet oppose a liberty to criticize? The answer, obviously, is that he cannot and does not. What Kimball neglects to observe is that one can take seriously the doings of others, can remonstrate, cajole, evangelize, debate, even ostracize, yet nonetheless reject the use of force to compel them to think and act as one wishes. This is not indifference or relativism; it is to insist on a crucial distinction between persuasion and coercion. For Kimball and Stephen, apparently, the only criticism worthy of mention comes at the business end of a cudgel. This is a doctrine as ugly as it is ignorant. Kimball dislikes Mill's characterization of conservatives as "the stupid party," but the evidence of this essay is that the appellation still fits.

In "The Bright Line: Liberalism and Religion," political scientist Jean Bethke Elshtain also directs some desultory shots at Mill, but her primary target is those contemporary liberals for whom every injection of religion into the public realm is perceived to be the harbinger of a new Inquisition. There is much justice to her complaint. Liberals—and, yes, libertarians—tend to be ungenerous in portraying the motives of those who locate themselves within traditional faith communities, and they vastly overestimate the political potency of the religious right while paying less heed to more dangerous foes.

Indeed, between the religious and the secular, oppression runs mostly in the reverse direction. "Families," Elshtain writes, "have been stripped of religious freedom in many concrete ways, including freedom to educate their children in a faith tradition." Her point is well-taken, but the suggested remedy of sneaking a minute of prayer back into the schools and placing crèches here and there on public spaces is palpably inadequate.

The conclusion that should have been drawn is that education, like religion, is too precious and personal to be left to the ministrations of a state that is pledged to neutrality. That, however, would be a bold stance, so instead she ineffectually frets.

Robert Conquest's "Liberals and Totalitarianism" skillfully retells the story of left-liberals' sycophancy for totalitarian dictators but does not shed much light on why they proved to be so susceptible to this disease. In "Liberalism and the Law," Hadley Arkes deplores liberals' zeal to secure through the courts outcomes they have failed to achieve in legislatures, but he concedes that conservatives do their best to play the same game. In his telling, the rule of law is an equal opportunity ca-

SCOTT STANTIS

sualty.

Perhaps the most curious contribution to the volume is John Silber's "Procedure or Dogma: The Core of Liberalism." Silber, the long-serving and controversial former president of Boston University, has almost nothing to say about the theory and practice of liberalism but lots to relate about his own career. It seems that in the face of ideological oppressiveness (the term "political correctness" had not yet been invented) and pusillanimity within and outside the academy, John Silber has been no less than a latter-day Socrates. Continually attacked by the ignorati, he nonetheless reliably stands straight and true for values of fairness and freedom. Perhaps this essay began as an after-dinner speech to prospective donors; how it ever made its way into this collection is baffling. It does, however, afford some clues as to why even those who broadly subscribed to Silber's agenda for the restructuring of universities often found his overweening self-regard hard to endure.

Roger Kimball dislikes John Stuart Mill's characterization of conservatives as "the stupid party," but the evidence of his essay is that the appellation still fits.

Two essays are outstanding. Military historian Robert Kagan's discussion of "Liberalism and American Foreign Policy" is erudite, nuanced, and thought-provoking. Do the ideas of those two defunct Republicans, Theodore Roosevelt and Henry Cabot Lodge, hold any continuing relevance for an America rethinking its place in a post–Cold War world? Kagan will convince you that indeed they do. Equally well-informed and perhaps even wider-ranging is historian Keith Windschuttle's "Liberalism and Imperialism." Windschuttle roams knowledgeably and assuredly between the empires of ancient Rome and 19th-century Great Britain, tying together military strategy, economic expansiveness, parliamentary infighting, and moral philosophy. It is a virtuoso performance, by itself worth the price of the book.

Former *National Review* Editor John O'Sullivan's sharp and entertaining concluding essay attempts to delineate broad thematic connections among the various contributions. He fails, but no one could have succeeded. For what this collection reveals above all else is that cohabiting within the rhetoric of contemporary conservatism are two distinct strands of opposition to liberalism. One is friendly to liberty and regrets its restriction by excrescences that have attached themselves to classical liberal theory and practice. The other is hostile to liberty as such because leaving people free to live according to their own lights undermines deference to traditional institutions. The former maintains that political arrangements have been trending mostly downhill for the past century, while the latter sees decay setting in with the coming of the Enlightenment.

Because these two strands share various common enemies, they come together as bedfellows within the pages of *The New Criterion* and in this volume. It is, however, purely a marriage of convenience and is destined sooner or later to end in messy divorce. Who then will emerge with the lion's share of conservatism's assets: the grumpy obscurantists who wish that people would once again learn to keep their place, or those intent to conserve the rights of individuals freely to make their own place as best they can? That is not the least significant of the numerous questions prompted by *The Betrayal of Liberalism.*

Contributing Editor Loren E. Lomasky (llomask@bgnet.bgsu.edu), a professor of philosophy at Bowling Green State University, is the co-author of Democracy and Decision *(Cambridge University Press).*

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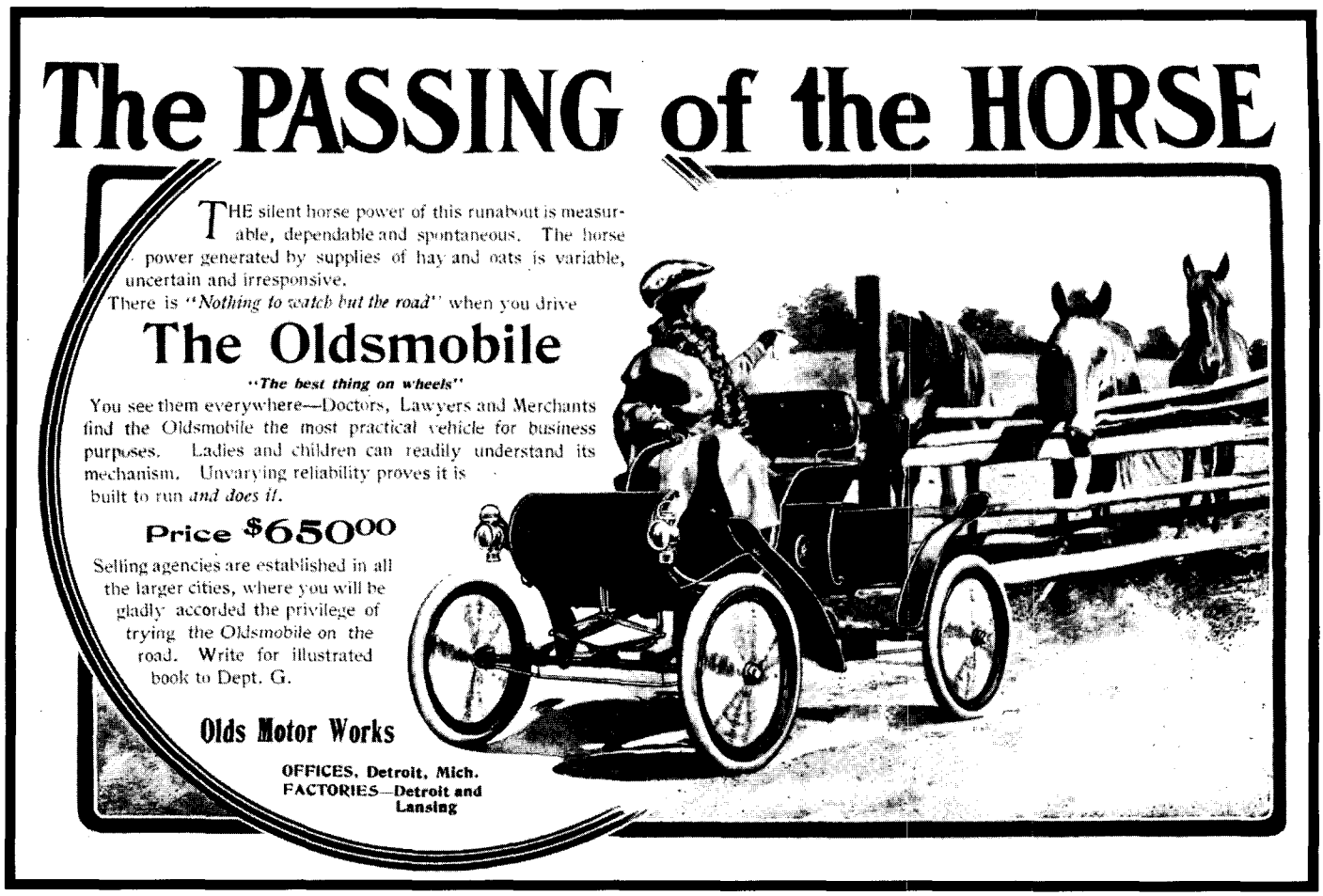
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On late December, General Motors announced that it would phase out its Oldsmobile division over the next few years, thus putting to sleep the longest-lived car brand in the country (named for its founder, Ransom Eli Olds, the first Oldsmobile hit the showroom in 1897). Despite a "history rich with innovation and success stories" (according to GM), Oldsmobile sales and market share have been in the tank for years. The news came in the wake of Daimler-Chrysler's earlier decision to kill its Plymouth brand—and amid continuing rumors that Ford plans to retire its Mercury line of cars.

As can be seen from this 1900 ad, Oldsmobile originally marketed itself as the very embodiment of creative destruction, as the next big thing coming down the pike. Given that, it is perhaps less puzzling that Oldsmobile is now heading to junkyard of history. Indeed, the more interesting question is how it lasted as long as it did.

—Nick Gillespie

s Russia on the Road to Recovery?

Alvin Rabushka is a senior fellow at the Hoover Institution.

Since 1991, living standards in Russia have fallen by 47 percent. The 1990s have witnessed serial defaults, currency devaluations, and continuous contraction. This year, for the first time, Russia is enjoying a 10 percent increase in industrial output and 7 percent economic growth. Tax and payroll arrears are being reduced. Foreign debt is being paid on schedule. A new president has pushed through a 13 percent flat tax, a balanced budget and is working on land and regulatory reforms.

Has Russia turned the corner?

The jury is still out on this question. This year's growth is largely attributable to high oil, gas, and other commodity prices. Foreign exchange earnings are helping fuel Russian economic activity. But true structural reform has yet to begin.

For years, the International Monetary Fund and other foreign experts have advised Russia to follow the trinity of stabilization, liberalization, and privatization (SLiP). Russia has clung faithfully to this path. The advice rested on the conventional wisdom that these policies would transform Russia and other postcommunist countries into market economies. But SLiP failed in Russia and other postcommunist countries. Why?

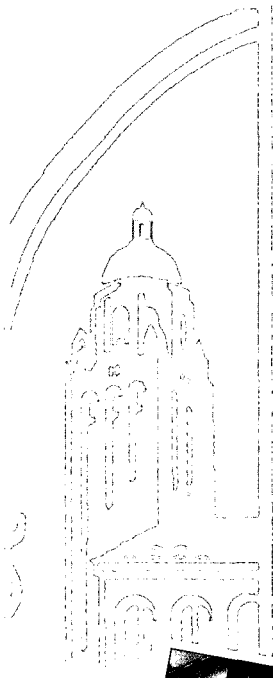
The Russian economy under central planning can be likened to a single nation-enterprise. When communism collapsed, the government lifted its economic controls over wages, prices, foreign trade, and capital flows. It rapidly privatized enterprises. However, these enterprises—a coordinated network of suppliers and producers under communism—quickly formed a network of their own outside government control.

The new network did not behave as enterprises do in market economies. Rather, enterprises began to socialize income, to the same degree as had occurred in Soviet Russia. First, they practiced tax nonremittance on a large scale, collecting taxes from the public but withholding a large portion from the government. In short, they confiscated public income. Second, to compensate for the fiscal shortfall, the government printed money to provide banks with cash to subsidize enterprises, hoping to reduce tax non-remittance. The resulting inflation resulted in the confiscation of public income and financial assets. The autonomous network of enterprises transformed itself into a new form of socialism, what we can call enterprise network socialism. Enterprises are private, exchange is free, but income is socialized and redistributed.

The focus of the foreign experts who recommended SLiP to Russia's young reformers was on the establishment of private property, whereas it should have been on the establishment of private income. They failed to see that private property, free movement of prices, and stable fiscal and monetary policies do not, and did not, prevent the socialization of income.

Breaking up the network and privatizing income are the keys to sustained growth. If the network persists, Russia will continue to suffer more defaults and contraction. A full exposition of these themes can be found on the Hoover Institution's topical web site at http://www.russiaeconomy.org.

—Alvin Rabushka



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